EDITOR'S NOTE

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o. 84-1717-CFY
tatus: GRANTED

Title: United States, Petitioner
v.
Michael Robert Quinn

ocketed:
ay 2, 1985

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Iredale, Eugene G.

ntry	Date	Note	Proceedings and Orders
1	Mar 22 1985		Application for extension of time to file petition and order granting same until May 2, 1985 (Rehnquist, March 26, 1985).
2	May 2 1985	G	Petition for writ of certiorari filed.
4	May 31 1985		Order extending time to file response to petition until July 2, 1985.
5	Jul 2 1985		Brief of respondent Michael R. Quinn in opposition filed.
6	Jul 10 1985		DISTRIBUTED. September 30, 1985
7	Sep 13 1985	X	Reply brief of petitioner United States filed.
9	Oct 7 1985		REDISTRIBUTED. October 11, 1985
10	Oct 15 1985		Petition GRANTED.
			**********
11	Nov 14 1985		Record filed.
12	Nov 14 1985		Certified copy original record & proceedings, 4 volumes, received.
13	Nov 29 1985		Joint appendix filed.
14	Nov 29 1985		Brief of petitioner United States filed.
15	Jan 7 1986		SET FOR ARGUMENT, Wednesday, March 5, 1986. (3rd case)
16	Jan 6 1986		Brief of respondent Michael R. Quinn filed.
17	Jan 13 1986		CIRCULATED.
18	Feb 24 1986	X	Reply brief of petitioner United States filed.
19	Mar 5 1986		ARGUED.

84-1717 - (1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a defendant has a Fourth Amendment expectation of privacy that entitles him to challenge the search of a boat, which he had never personally used prior to the search and which had been out of his custody and control for two months at the time of the search, on the grounds that he was the owner of the boat and was a co-venturer in a criminal enterprise involving the use of the boat by others to smuggle marijuana in which he had a possessory interest.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

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MICHAEL ROBERT QUINN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 751 F.2d 980.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 4a) was entered on November 2, 1984. A petition for rehearing was denied on February 1, 1985 (App., *infra*, 6a). On March 26, 1985, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In a four-count indictment returned in August 1983 in the United States District Court for the Northern District of California, respondent was charged with importing 12,000 pounds of marijuana into the United States on June 23, 1979, in violation of 21 U.S.C. 952(a); possessing with intent to distribute 12,000 pounds of marijuana on that date, in violation of 21 U.S.C. 841(a)(1); conspiring to import marijuana, in violation of 21 U.S.C. 963; and conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. Following the district court's denial of his suppression motion on grounds of "standing," respondent entered a conditional plea of guilty on the importation conspiracy count pursuant to Fed. R. Crim. P. 11(a)(2); the plea was conditioned on the outcome of respondent's appeal of the "standing" ruling. Respondent was sentenced to three years' imprisonment, fined $15,000, and ordered to forfeit a ranch and boat that were involved in the drug smuggling enterprise. The court of appeals reversed the district court's decision on the issue of "standing" and remanded for disposition of respondent's suppression motion on the merits.

1. The relevant facts are set forth in the government's brief and supporting affidavit in opposition to respondent's motion to suppress (E.R. 10-12, 22-27).[1] Respondent did not contest the government's submission or present any additional evidence.

This uncontroverted record shows that in 1978 respondent solicited co-conspirator George Hunt to participate in a scheme to import marijuana by boat

[1] "E.R." refers to respondent's Excerpt of Record in the court of appeals.

from Colombia to respondent's ranch on the coast of Northern California.[2] The scheme contemplated that respondent would purchase a boat for transporting the marijuana and that Hunt would obtain a crew, pick up the marijuana in Colombia and deliver it to California, and then go to Mexico with the boat and crew. Pursuant to that plan, respondent purchased a fishing boat, the *Sea Otter*, in San Diego. E.R. 23. Respondent has not contended that he personally used the *Sea Otter* at that time or maintained living quarters or storage space on it.

In the spring of 1979, respondent turned over the *Sea Otter* to three men who had been recruited by Hunt, and they sailed to Mexico to meet Hunt. In May 1979, the *Sea Otter* picked up 12 tons of marijuana in Colombia. It then traveled back to California, where the crew contacted respondent and delivered the shipment to his ranch in June. Respondent did not accompany the others on any part of this trip, and at no time during this approximately two-month period was he aboard the *Sea Otter*. E.R. 10, 23; App., *infra*, 9a.

Thereafter, on the evening of June 27, 1979, California Fish and Game officials boarded the *Sea Otter* because they suspected that it had been engaged in unlawful fishing operations. However, an inspection could not be conducted due to darkness, and the officers returned the next morning. At that time they observed in plain view marijuana debris and items that had been purchased in Mexico. The state officers then left and notified the United States Coast Guard

[2] Following his eventual extradition from Colombia in August 1983, Hunt pleaded guilty pursuant to a plea agreement and testified before the grand jury that returned the instant indictment against respondent (E.R. 25-26).

and the Customs Service of their suspicions that the *Sea Otter* had been involved in smuggling marijuana. E.R. 10-11, 24.

A short time later, federal officials intercepted the *Sea Otter* and went aboard. The crew was unable to produce the documentation for the boat, and one of the crew members was discovered to have an expired visa. Hunt then admitted that he had not contacted either the Coast Guard or the Immigration and Naturalization Service when the vessel arrived at the California coast. Moreover, the officials came across a receipt for repair work done in Mexico, and Hunt conceded that these repairs had not been reported to Customs. Finally, although the crew members denied that they had been ashore in California, the federal officers saw two large rafts on board that appeared to have been recently used. E.R. 11-12, 24.

The *Sea Otter* was placed under constructive seizure and taken to a Coast Guard station. There, water in its forward holds was pumped out, and marijuana residue was found. Hunt and the other crew members were arrested, but they were later released when no formal charges were brought. E.R. 11-12, 24.

Hunt remained in the San Francisco area for nine months while the *Sea Otter* underwent repairs. He then took the boat to Costa Rica and used it for commercial fishing. In November 1981, the *Sea Otter* was turned over to respondent in Costa Rica. E.R. 12, 24. Respondent has made no claim that he personally used or was even ever aboard the *Sea Otter* during the two and one-half years between the spring of 1979 and November 1981.

2. In the district court, respondent filed a motion to suppress evidence on the ground that the stop and

the search of the *Sea Otter* were unlawful. In seeking suppression, respondent relied on the facts that he was the owner of the *Sea Otter*, that he owned the marijuana that was being transported, and that Hunt and the crew were using the boat with his permission as part of a joint criminal venture. The district court denied the motion, finding that respondent had no expectation of privacy and thus lacked "standing" under the Fourth Amendment because he was not present at the time of the search and had turned over the vessel to the control and operation of others (App., *infra*, 7a-9a).

3. On respondent's appeal pursuant to his conditional guilty plea, a divided panel of the court of appeals reversed (App., *infra*, 1a-4a). The majority concluded that respondent had a legitimate expectation of privacy in the *Sea Otter*, which entitled him to challenge the validity of the search, "based on the conjunction" (*id.* at 2a) of the following factors: (1) "[h]is ownership of the boat" (*ibid.*); (2) "[h]is possessory interest in the marijuana seized, arising from his joint venture with Hunt for the smuggling of marijuana" (*ibid.*); (3) "[t]he fact that the boat, when searched, was returning from a delivery of marijuana to [respondent] and was, thus, pursuing the purpose of [his] joint venture" (*ibid.*); and (4) "[t]he fact that to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy" (*id.* at 3a). Accordingly, the court of appeals remanded the case to the district court for consideration of the merits of respondent's motion to suppress (*ibid.*).

Judge Sneed dissented (App., *infra*, 4a). He stated that a defendant's expectation of privacy would be

reasonable and legitimate under the Fourth Amendment only if it "corresponds to that which would have been entertained by a reasonable, but innocent and law abiding, person having the same relationship as did the [defendant] to the area and objects searched" (*ibid.*). Applying that standard, Judge Sneed concluded that respondent had no Fourth Amendment privacy interest in the *Sea Otter* because "[m]ere ownership of the boat and a joint venture to transport non-contraband (lumber, for example) would not lead a reasonable co-owner, who was neither a member of the crew nor a passenger, to expect that any papers or valuables he placed in the hold of the boat would remain private" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The undisputed record in this case establishes that respondent never personally used the *Sea Otter* or maintained private quarters on it, that he purchased the boat for the purpose of having other people use it in connection with a drug smuggling venture, that he was not present on the *Sea Otter* during its South American voyage or at the time it was searched, and that the boat was out of his custody and control during both the two-month period preceding that search and the two years following the search.[3] Nevertheless, the Ninth Circuit held that respondent had a legitimate expectation of privacy in the *Sea Otter*, and therefore could seek the suppression of evidence, because he was the owner of the boat and because he was a co-venturer in the drug operation and had a

[3] As "[t]he proponent of a motion to suppress [, respondent] ha[d] the burden of establishing that his own Fourth Amendment rights were violated by the challenged search." *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978).

possessory interest in the marijuana that was seized. On that basis, the court of appeals reversed the district court's determination that respondent did not have "standing" under the Fourth Amendment to challenge the search. The Ninth Circuit's legal analysis—holding that a defendant has a legitimate privacy interest arising from his status as the owner of the searched conveyance and a co-venturer in the illicit scheme—is fundamentally incorrect and conflicts with the decisions of this Court and of other courts of appeals. Moreover, the court's ruling involves an important and recurring issue under the Fourth Amendment. Accordingly, this Court's review is warranted. Because the Ninth Circuit's error is manifest, the Court may wish to consider summary reversal.

1. The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977). As the Court explained in *United States* v. *Knotts*, 460 U.S. 276, 280-281 (1983), quoting *Smith* v. *Maryland*, 442 U.S. 735, 740-741 (1979), and *Katz* v. *United States*, 389 U.S. 347 (1967):

> "Consistently with *Katz*, this Court uniformly has held that application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. [Citations omitted.] This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' 389 U.S. at 361—whether, in the words of

> the *Katz* majority, the individual has shown that 'he seeks to preserve [something] as private.' *Id.*, at 351. The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable," ' *id.*, at 361—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances. *Id.*, at 353."

Proper application of the Fourth Amendment requires a court to reconcile the "conflict * * * between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement." *United States* v. *Ross*, 456 U.S. 798, 804 (1982).

In order to contest the legality of a search as a basis for seeking the suppression of evidence, a defendant must show that the search implicated a privacy interest of his that the Fourth Amendment protects. See *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978). Under settled principles, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). Thus, it is "the established rule that a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights. [Citations omitted.] And the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party." *United States* v. *Payner*, 447 U.S. 727, 731 (1980) (emphasis in original). For this reason, "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by

the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman*, 394 U.S. at 171-172. See also *United States* v. *Salvucci*, 448 U.S. 83, 86-87, 94 (1980); *Rakas*, 439 U.S. at 133-134 & n.3, 137, 138.

2. In holding that respondent had a legitimate expectation of privacy in the *Sea Otter*, the Ninth Circuit departed from the clear teachings of this Court's decisions. The factors cited by the court below do not demonstrate the requisite privacy interest to entitle respondent to challenge the search of the boat. On the contrary, by allowing a defendant to seek the suppression of evidence even though he had made no personal use of the searched conveyance and had relinquished custody and control of it for an extended period, the court of appeals has unreasonably expanded Fourth Amendment rights beyond the bounds fixed by this Court.

a. In concluding that respondent had an expectation of privacy in the *Sea Otter*, the court of appeals first relied on "[h]is ownership of the boat" (App., *infra*, 2a). But this Court has made clear that title to the object or area searched does not suffice to create a privacy interest under the Fourth Amendment. See, *e.g.*, *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984), slip op. 11-12; *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5-6; *Knotts*, 460 U.S. at 285; *Rakas*, 439 U.S. at 143-144 & n.12; *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968); *Katz*, 389 U.S. at 352-353. The "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143; see

also *Mancusi* v. *DeForte*, 392 U.S. at 368. Because "[t]he Fourth Amendment protects legitimate expectations of privacy rather than simply places," an "owner may retain the incidents of title and possession but not privacy." *Andreas*, slip op. 5, 6. Thus, " 'even a property interest in [the] premises [searched] may not be sufficient to establish a legitimate expectation of privacy * * *.' " *Oliver*, slip op. 11, quoting *Rakas*, 439 U.S. at 144 n.12.[4]

The courts of appeals likewise have recognized that ownership of property does not itself confer a Fourth Amendment privacy interest. See, *e.g.*, *United States* v. *DeWeese*, 632 F.2d 1267, 1270 (5th Cir. 1980), cert. denied, 454 U.S. 878 (1981); *United States* v. *Ramapuram*, 632 F.2d 1149, 1154 (4th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979); *United States* v. *Dall*, 608 F.2d 910, 914-915 (1st Cir. 1979), cert. denied, 445 U.S. 918 (1980); *United States* v. *Dyar*, 574 F.2d 1385, 1390

[4] The Court has followed a similar analysis in the analogous area of third-party consent searches. See *United States* v. *Matlock*, 415 U.S. 164, 171 n.7 (1974):

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, * * * but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

(5th Cir.), cert. denied, 439 U.S. 982 (1978); *United States* v. *Kelly*, 529 F.2d 1365, 1369 (8th Cir. 1976); *United States* v. *Nunn*, 525 F.2d 958, 959, (5th Cir. 1976); *United States* v. *Hunt*, 505 F.2d 931, 940-941 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975). As the court explained in *Dyar*, 574 F.2d at 1390:

> Traditional or common law theories of property rights do not automatically confer standing to challenge a search. Property rights in the absence of reasonable expectations of privacy in property cannot support a Fourth Amendment claim * * *. Ownership * * * must be accompanied by a cognizable privacy interest in the place or thing searched.

Thus, "[o]wnership alone is not enough to establish a reasonable and legitimate expectation of privacy"; rather, "the total circumstances determine whether the one challenging the search has a reasonable and legitimate expectation of privacy in the locus of the search." *Dall*, 608 F.2d at 914. It is insufficient for a defendant to "offer[] nothing more * * * than * * * bare legal ownership of [the place searched]. While this may adequately establish a property right, he has not sustained his burden of showing that his Fourth Amendment privacy interest has been invaded * * * [because] he 'took normal precautions to maintain his privacy' * * * [or] used the [place] in such a way as to raise a legitimate expectation of privacy." *Rios*, 611 F.2d at 1345 (citation and footnotes omitted).

To be sure, "by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment."

Rakas, 439 U.S. at 144 n.12. Accordingly, ownership may be relevant as "one element" in analyzing the existence of a legitimate privacy interest. *Oliver*, slip op. 11. An owner's expectation of privacy may rest, for example, on the use he makes of his property and his exclusion of others from the property. See *Oliver*, slip op. 6; *Rakas*, 439 U.S. at 144 n.12; *id.* at 153 (Powell, J., concurring). But in the end, it is the expectation of privacy, not the fact of ownership as such, that is the controlling Fourth Amendment standard.

In this case, it is evident that respondent had no privacy interest in the *Sea Otter*. See 3 W. LaFave, *Search and Seizure* § 11.3, at 575 (1978). Although he was technically the owner, respondent had never used the boat, had not lived aboard it or kept private quarters on it, and did not utilize it as a repository for personal effects. To the contrary, respondent had purchased the vessel for the specific purpose of having others operate it to smuggle drugs. Moreover, the *Sea Otter* was entirely out of respondent's custody and control for a significant period—two months—before the search in question took place in June 1979, and it remained out of his possession for more than two years thereafter. Nor during that time did respondent undertake in any way to maintain the privacy interest that he now asserts.

In these circumstances, respondent's bare title does not establish an expectation of privacy in the *Sea Otter*. His lack of use of the boat, and its extended absence from his custody and control, clearly demonstrate that he had no privacy interest that was infringed by the challenged search. Mere ownership of the object searched does not, without more, entitle a defendant to seek suppression of evidence obtained during the search.

b. The court of appeals also premised respondent's privacy interest on the fact that he was engaged in a "joint venture with Hunt for the smuggling of marijuana" and that, as part of that venture, he had a "possessory interest in the marijuana seized" (App., *infra*, 2a). See also *United States* v. *Johns*, 707 F.2d 1093, 1099-1100 (9th Cir. 1983), rev'd on other grounds, No. 83-1625 (Jan. 21, 1985); *United States* v. *Mazzelli*, 595 F.2d 1157 (9th Cir. 1979), vacated and remanded *sub nom. United States* v. *Conway*, 448 U.S. 902 (1980). However, under the settled decisions of this Court, respondent's role in the drug smuggling operation does not create a reasonable and legitimate expectation of privacy.[5]

As discussed above (see pages 8-9, *supra*), the interest in privacy protected by the Fourth Amendment is a personal right, and a defendant may not vicariously assert the rights of third parties as a ground for seeking the suppression of evidence against him. In particular, confederates in a criminal enterprise—whether called co-conspirators, co-defendants, or co-venturers—"have been accorded no special

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[5] The court of appeals elaborated on this rationale by noting that the *Sea Otter*, "when searched, was returning from a delivery of marijuana to [respondent] and was, thus, pursuing the purpose of [respondent's] joint venture" (App., *infra*, 2a). In the court's view, "[w]here a joint venture is being pursued, the mere fact of a joint venturer's absence from the place searched is insufficient to establish abandonment or relinquishment of the property seized" (*id.* at 2a-3a). But the issue here is not whether respondent abandoned or relinquished a privacy interest that he had; rather, the question is whether he had an expectation of privacy in the first place. As we discuss in the text, respondent's status as a co-venturer with a possessory interest in the seized marijuana does not support his privacy claim.

standing" to raise the Fourth Amendment rights of each other. *Alderman*, 394 U.S. at 172; see also, *e.g.*, *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 10-11; *Standefer* v. *United States*, 447 U.S. 10, 23-24 (1980); *Brown* v. *United States*, 411 U.S. 223, 230 & n.4 (1973). Respondent's position as a co-venturer does not expand the claims he may advance in support of his motion to suppress.

Likewise, respondent's co-venturer status does not give rise to a protected expectation of privacy on his part. The fact that respondent acted in league with others in the marijuana smuggling scheme simply does not bear on the question whether he himself had a privacy interest in the *Sea Otter* in the first instance; a defendant's role as a co-venturer cannot create a personal privacy interest that does not otherwise exist. Any other rule would be inconsistent with the well-established principles of privacy that underlie the Fourth Amendment, and indeed would amount to nothing more than a circumvention of this Court's holdings that a defendant may not vicariously invoke the rights of co-conspirators.

Contrary to the decision below, other courts of appeals have recognized that a defendant's participation in a joint criminal venture does not establish a personal expectation of privacy under the Fourth Amendment. See, *e.g.*, *United States* v. *Manbeck*, 744 F.2d 360, 373-374 (4th Cir. 1984), cert. denied, No. 84-1194 (Feb. 19, 1985); *United States* v. *Brown*, 743 F.2d 1505, 1506-1507 (11th Cir. 1984); *United States* v. *Knotts*, 662 F.2d 515, 518 (8th Cir. 1981), rev'd on other grounds, 460 U.S. 276 (1983); *United States* v. *DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981); *United States* v. *Davis*, 617 F.2d 677, 690 (D.C. Cir. 1979), cert. denied, 445 U.S. 967 (1980); *United States* v. *Archbold-Newball*, 554 F.2d 665, 678 (5th Cir.), cert. denied, 434 U.S. 1000 (1977); *United States* v. *Galante*, 547 F.2d 733, 739 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Hunt*, 505 F.2d at 940, 941-942. As the court explained in *Hunt* (*id.* at 942):

> [A] principal-agent relationship sufficient to imply culpability may certainly fall short of conferring standing for Fourth Amendment purposes. Defendants' contention flies directly in the face of *Alderman* * * *.
>
> * * * Fifteen years of Supreme Court decisions stand squarely in the way of defendants' attempt to create a rule of *per se* standing for parties in a principal-agent relationship. This claim of privacy by agency is just the sort of vicarious assertion of Fourth Amendment rights that *Alderman* and *Brown* forbid.

Nor does a legitimate expectation of privacy arise merely because respondent, in connection with his role in the drug smuggling scheme, asserted a possessory interest in the marijuana that was seized during the search of the *Sea Otter*.[6] Although at one time it was assumed that "a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment 'stand-

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[6] In fact, the *Sea Otter* was stopped and searched after its cargo of marijuana had been delivered to respondent's ranch, and only marijuana residue was found on the boat. The seizure of that residue did not interfere with respondent's possessory interest. First, because those trace amounts were left aboard the *Sea Otter* after the shipment of marijuana had been unloaded, any interest therein had been abandoned. Second, the Fourth Amendment does not protect a property interest in such de minimis quantities. See *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 15.

ing,'" that "assumption * * * is no longer so." *United States* v. *Salvucci*, 448 U.S. 83, 90 (1980) (footnote omitted). Rather, the Court has "decline[d] to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched" (*id.* at 92). Because of the difference between privacy and possessory interests,[7] "legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest, for it does not invariably represent the protected Fourth Amendment interest" (*id.* at 91). Thus, "[t]he person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation" (*ibid.*). See also *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980).

Of course, the fact that one's personal effects are kept in a place may be relevant to the question whether the person has a reasonable expectation of privacy in that place. See *Rawlings*, 448 U.S. at 105; *Salvucci*, 448 U.S. at 91; *Rakas*, 439 U.S. at 142 n.11, 144 n.12. But this simply reflects the more general proposition that the use to which the searched property was put—including its use as a repository for one's possessions—is one indication of a privacy interest. See *Oliver*, slip op. 6; *Rakas*, 439 U.S. at 144 n.12; *id.* at 153 (Powell, J., concurring). The dispositive issue remains, however, "not merely

[7] See, *e.g.*, *United States* v. *Karo*, No. 83-850 (July 3, 1984), slip op. 6; *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 3; *Salvucci*, 448 U.S. at 91 n.6; *United States* v. *Lisk*, 522 F.2d 228, 230-231 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976), subsequent opinion, 559 F.2d 1108 (7th Cir. 1977).

whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched" (*Salvucci*, 448 U.S. at 93), and "property rights are neither the beginning nor the end of this * * * inquiry" (*id.* at 91).[8]

[8] Even if a possessory interest in the items seized could entitle a defendant to contest the underlying search, an asserted interest in contraband would not support a Fourth Amendment claim. The theory for allowing a possessory interest in the seized objects to authorize a challenge to the search (which the Court rejected in *Salvucci* and *Rawlings*) is that "[w]hen the government seizes a person's property, it interferes with his constitutionally protected right to be secure in his effects. * * * If the defendant's property was seized as the result of an unreasonable search, the seizure cannot be other than unreasonable." *Rawlings*, 448 U.S. at 118 (Marshall, J., dissenting). However, a person can have no lawful possessory interest in contraband that, by definition, he may not legally possess. "Congress has decided—and there is no question about its power to do so—to treat the interest in 'privately' possessing [contraband drugs] as illegitimate * * *." *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 13; see also *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5; *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 10-11; cf. *Rakas*, 439 U.S. at 141 n.9 (stolen property); *Brown* v. *United States*, 411 U.S. 223, 230 n.4 (1973) (same). Because the Fourth Amendment protects only "legitimate" expectations of privacy that "society is prepared to recognize as reasonable" (see *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 11; *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 7), a claimed interest in contraband provides no basis for a defendant to seek to suppress evidence. The courts of appeals have recognized that possession of contraband does not give rise to a legitimate Fourth Amendment interest. See, *e.g.*, *United States* v. *Manbeck*, 744 F.2d at 374 n.16; *United States* v. *Parks*, 684 F.2d 1078, 1083 n.7 (5th Cir. 1982); *United States* v. *Bruneau*, 594 F.2d 1190, 1194 n.6 (8th Cir.), cert. denied, 444 U.S. 847 (1979); *United States* v. *Washington*, 586 F.2d

For these reasons, the Ninth Circuit plainly erred in concluding that respondent had an expectation of privacy in the *Sea Otter* because of his status as a co-venturer and his possessory interest in the seized marijuana.[9]

1147, 1154 (7th Cir. 1978); *United States* v. *Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States* v. *Moore*, 562 F.2d 106, 111 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978); *United States* v. *Galante*, 547 F.2d 733, 739-740 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Emery*, 541 F.2d 887, 890 (1st Cir. 1976).

[9] The court below also noted (App., *infra*, 3a) that "to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy." This is plainly a makeweight. "[T]he concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities" (*Jacobsen*, slip op. 12 (footnote omitted)); thus, the fact that a criminal intends contraband to remain hidden does not establish a Fourth Amendment privacy interest. Beyond that, there is no indication that respondent had anything to do with the decision to put either the marijuana or the water in the hold. Moreover, the most likely explanation is that the water provided ballast for the boat after its 12-ton cargo of marijuana had been unloaded, not that it was used to conceal the marijuana that was being transported. And at all events marijuana debris was also discovered in plain view on the *Sea Otter*. Finally, as other courts of appeals have recognized, there is no substantial expectation of privacy in the hold of a boat, which is an area open to common access and subject to routine inspections by law enforcement officials. See, *e.g.*, *United States* v. *Manbeck*, 744 F.2d at 384 n.37; *United States* v. *Herrera*, 711 F.2d 1546, 1553 n.12 (11th Cir. 1983); *United States* v. *Bent*, 707 F.2d 1190, 1193 (11th Cir. 1984), cert. denied, No. 83-5835 (Apr. 30, 1984); *United States* v. *Freeman*, 660 F.2d 1030, 1034 (5th Cir. 1981), cert. denied, 459 U.S. 823 (1982); *United States* v. *Willis*, 639 F.2d 1335, 1337 (5th Cir. 1981); *United States* v. *Williams*, 617 F.2d 1063, 1075, 1085-1086 (5th Cir. 1980) (en banc). See generally *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983); *United States* v. *Ross*, 456 U.S. 798, 805-806 & nn.6, 7 (1982); *Carroll* v. *United States*, 267 U.S. 132, 149-153 (1925); 14 U.S.C. 89(a); 16 U.S.C. 971f; 19 U.S.C. 1581(a).

c. The decision below cannot be justified by the court of appeals' unexplained reliance on the foregoing factors in "conjunction" rather than individually (App., *infra*, 2a). As demonstrated above, neither respondent's title to the *Sea Otter* nor his role as a co-venturer with a possessory interest in the seized marijuana gave rise to an expectation of privacy in the searched vessel. We fail to see how these considerations, which separately afford no analytical basis for a claim of privacy, can be taken in the aggregate to establish a cognizable privacy interest. The Ninth Circuit cannot evade this Court's precedents by purporting to rely on a cumulation of legally insufficient factors.

Moreover, the court of appeals' conclusion directly conflicts with decisions in other circuits. Those courts have recognized that the owner of a conveyance cannot necessarily claim an expectation of privacy under the Fourth Amendment (see *United States* v. *Dall*, 608 F.2d at 914) and that no privacy interest is created simply because he was a co-venturer in the criminal enterprise (see *United States* v. *Dyar*, 574 F.2d at 1386-1387, 1390) or allegedly owned the seized contraband (see *United States* v. *Rios*, 611 F.2d at 1344-1345). See also 3 W. LaFave, *Search and Seizure* § 11.3, at 214 n.15, 238 n.145.1 (Supp. 1984). Thus, the Ninth Circuit's decision is inconsistent with the principles established by this Court and the decisions of other courts of appeals.

3. The incongruity of the Ninth Circuit's holding cannot be doubted. The court has allowed respondent to seek the suppression of evidence based on an asserted expectation of privacy in the *Sea Otter* notwithstanding that he had never personally used the boat and that it had been out of his custody and control for a considerable period of time when the search occurred. By relying on respondent's title to the vessel and his status as a co-venturer in the marijuana smuggling scheme, the court of appeals has invented a legal principle that automatically confers Fourth Amendment "standing" on the absentee owner of a conveyance to challenge any search of that conveyance that takes place during the course of a joint criminal venture. In so doing, the court below followed an erroneous legal analysis and reached an untenable result.

Moreover, the question presented in this case is one of considerable significance that frequently arises in criminal prosecutions. As evidenced by the cases previously cited, it is commonly the situation that a defendant—and often the leader of the illegal scheme—will purchase a conveyance for his confederates to use in a joint criminal enterprise. To permit that defendant to move to suppress evidence based on a challenge to the search, even though no privacy interest of his was infringed, is an unsupported and unsound rule that this Court should not allow to stand.[10]

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[10] The fact that the court of appeals remanded to the district court for further proceedings on respondent's motion to suppress (App., *infra*, 3a) does not militate against this Court's review. See, *e.g.*, *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 3. First, the legal issue that warrants review is the court of appeals' treatment of Fourth Amendment "standing," not the question whether the particular stop and search in this case were reasonable or unreasonable. It is important that the Court promptly resolve that "standing" issue in order to avoid the recurring problems and confusion that will ensue if the decision below remains the law in the Ninth Circuit.

Second, respondent's plea of guilty (see page 2, *supra*) is conditioned on his appeal of the district court's ruling that he had no "standing" to contest the search of the *Sea Otter*; it is not conditioned on the overall outcome of his suppression motion on the merits. See Clerk's Record No. 47. Thus, the conditional guilty plea, including the forfeiture of certain of respondent's property, will be vacated as a result of the court of appeals' ruling on "standing." We are advised by the United States Attorney that, as respondent is already aware, the government's principal witness has left the country and is no longer available to testify. Accordingly, even if the government prevails on the merits of respondent's suppression motion, it will be unable to proceed with the prosecution. As a practical matter, therefore, resolution of the "standing" issue will be the end of the proceeding. In this circumstance, the case cannot be viewed as interlocutory in any meaningful sense.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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MAY 1985

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1017

D.C. No. Cr-83-0493-RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of California
Honorable Robert H. Schnacke, Presiding

Argued and Submitted August 7, 1984

[Filed Nov. 2, 1984]

OPINION

Before: BROWNING, Chief Judge, MERRILL and SNEED, Circuit Judges

PER CURIAM.

Quinn appeals from the District Court's pre-trial ruling that he lacks standing to contest the search of his fishing vessel. We reverse.

Quinn had a legitimate expectation of privacy in the place searched (his boat), giving him a basis to charge that the search invaded his Fourth Amendment rights and to call for a judicial determination of the validity of this charge. *See United States v. Salvucci*, 448 U.S. 83, 91-92 (1980); *Rakas v. Illinois*, 439 U.S. 128, 138-40, 143 (1978).

This legitimate expectation of privacy was based on the conjunction of the following:

(1) His ownership of the boat.

(2) His possesory interest in the marijuana seized, arising from his joint venture with Hunt for the smuggling of marijuana from the west coast of Colombia to Quinn's ranch in Humboldt County, California. Ownership of both the place searched and the item seized conferred standing in pre-*Rakas* cases. *See, e.g., United States v. Jeffers*, 342 U.S. 48, 49-50, 54 (1951). Dual ownership remains significant under the expectation of privacy standard. *See Salvucci*, 448 U.S. at 90-91 n.5; *Rakas*, 439 U.S. at 136.

(3) The fact that the boat, when searched, was returning from a delivery of marijuana to Quinn and was, thus, pursuing the purpose of Quinn's joint venture. *See United States v. Pollack*, 726 F.2d 1456, 1465 (9th Cir. 1984); *United States v. Johns*, 707 F.2d 1093, 1100 (9th Cir. 1983), *cert. granted*, 104 S.Ct. 3532 (1984); *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982) (per curiam). Where a joint venture is being pursued, the mere fact of a joint venturer's absence from the place searched is in-

sufficient to establish abandonment or relinquishment of the property seized. *See Johns*, 707 F.2d at 1099-1100. *Compare United States v. Mendia*, 731 F.2d 1412, 1413 (9th Cir. 1984); *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 449 (9th Cir. 1983), *cert. denied* 104 S.Ct. 981 (1984) (no interest in the continuing transport of contraband deriving from a joint venture).

(4) The fact that to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy. *Compare Mercedes*, 708 F.2d at 449 (contraband was "arguably in plain view").

Reversed and remanded for consideration of the merits of Quinn's motion to suppress.

SNEED, Circuit Judge, Dissenting:

I respectfully dissent. Quinn hoped, and no doubt to some extent expected, that the contraband would remain undetected. That is not enough to entitle him to invoke the protection of the Fourth Amendment. *See United States v. Brown*, 731 F.2d 1491 (11th Cir. 1984). Rather, the test is whether the expectation that did exist corresponds to that which would have been entertained by a reasonable, but innocent and law abiding, person having the same relationship as did the appellant to the area and objects searched. Only then is the expectation legitimate. The Fourth Amendment protects the guilty because only by doing so can the innocent be protected. The innocent are not mere incidental beneficiaries of an amendment designed to protect the guilty. The innocent are its primary beneficiaries; the reasonableness of any expectation of privacy should be ascertained from their standpoint.

Approached in this manner, I think the district court was right. Mere ownership of the boat and a joint venture to transport non-contraband (lumber, for example) would not lead a reasonable co-owner, who was neither a member of the crew nor a passenger, to expect that any papers or valuables he placed in the hold of the boat would remain private. Our decision in *United States v. Johns*, 707 F.2d 1093 (9th Cir. 1983), is distinguishable in that there both joint venturers exercised continuing control of the place searched. That is not the case here. This case falls easily within the reach of *United States v. One 1977 Mercedes Benz*, 708 F.2d 444 (9th Cir. 1983), *cert. denied sub nom. Webb v. United States*, 104 S. Ct. 981 (1984).

I would affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1017
D.C. No. Cr 83-0493 RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of California

[Filed Feb. 28, 1985]

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

A TRUE COPY
ATTEST Feb. 27, 1985
PHILLIP B. WINBERRY
Clerk of Court

by: /s/ Verna Groves
Deputy Clerk

Filed and entered November 2, 1984

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1017

D.C. No. CR-83-0493 RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELL[EE]

vs.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

[Filed Feb. 1, 1985]

ORDER

Before: BROWNING, Chief Judge, MERRILL and SNEED, Circuit Judges

The panel has voted to deny the petition for rehearing * and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Judge Sneed voted to grant panel rehearing.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. CR-83-0493-RHS

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MICHAEL ROBERT QUINN, DEFENDANT

REPORTER'S TRANSCRIPT

Before: THE HONORABLE ROBERT H. SCHNACKE, Judge

[2] FRIDAY, NOVEMBER 18, 1983

THE CLERK: Calling Criminal No. 83-493, United States versus Michael Quinn.

Counsel, please step forward. State your appearance.

MR. NERNEY: Dennis Nerney for the United States. Good morning.

MR. IREDALE: Gene Iredale for Mr. Quinn. Mr. Quinn is before the court on bond this morning

THE COURT: Let's start with the motion to suppress. Does the defendant have any standing to make that motion?

MR. NERNEY: It's my position that he doesn't, Your Honor; that he had no right or reason to expect privacy in the vessel, having turned it over to other people.

THE COURT: Do you quarrel with that?

MR. IREDALE: Yes, I do quarrel with it, Your Honor. We believe that Mr. Quinn, and it's undisputed and I think the Government will stipulate Mr. Quinn was the owner and the registered owner of the Sea Otter at the time this search occurred.

In addition, Your Honor, as the Court can see from several of the other motions that we have filed, there is a witness in this case named George Mayberry Hunt. And Mr. Hunt, apparently, is beyond the subpoena power of the defense at this time. He is staying in Costa Rica. He apparently has an agreement with the Government to return for trial. But if there is any question or any dispute as to the issue of standing, [3] we will ask leave of court, and request the court to allow us to call Mr. Hunt on the issue of standing.

THE COURT: And Mr. Hunt will say that Mr. Quinn was aboard and in command of the vessel and in charge of the vessel?

MR. IREDALE: No, sir.

THE COURT: It's perfectly clear he wasn't on the vessel. It's perfectly clear that he committed the vessel to a charter. Someone else was operating the vessel?

MR. IREDALE: Correct.

THE COURT: He has no standing to present the motion to suppress and that motion will be denied.

MR. IREDALE: Will the Court allow us to call Mr. Hunt in order to establish standing on that issue?

THE COURT: Sure.

MR. IREDALE: And of course, Mr. Hunt, Your Honor, is in Costa Rica, but we would ask leave of court, when he does appear at trial, if we could renew the motion and establish standing through him.

THE COURT: Make any kind of motions you want and certainly, you can ask for reconsideration on any motion.

MR. IREDALE: Thank you.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10202

84-1717

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorney for Respondent
MICHAEL ROBERT QUINN

QUESTIONS PRESENTED

Whether the sole owner of a boat has standing under the Fourth Amendment to contest the seizure and search of this boat based upon the combined factors that he was the registered and actual owner of the boat, that the boat was pursuing the objectives of the owner's joint venture at the time of the search, that the particular items seized belonged to the owner of the boat, and that reasonable precautions were taken to preserve the privacy of the boat.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The Opinion of the court of appeals (App., infra, 1a-4a) is reported at 751 F.2d 980.

JURISDICTION

The judgment of the court of appeals (App., infra, 4a) was entered on November 2, 1984. A petition for rehearing was denied on February 1, 1985, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C.1254(1)

STATEMENT

On August 4, 1983, a four count indictment was returned in the United States District Court for the Northern District of California. Count One of the indictment charged respondent MICHAEL QUINN with violating Title 21, U.S.C. section 952(a) (importation of a controlled substance). Count Two charged a violation of Title 21, U.S.C. section 841(a)(1) (possession with intent to distribute marijuana), and Counts Three and Four of the indictment charged conspiracies to import marijuana and to possess marijuana with intent to distribute it, respectively. (E.R. pages 1-3).[1]

On November 18, 1983, the trial court denied respondent QUINN's motion to suppress all evidence seized as a result of the search of the fishing

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1. "E.R." refers to Respondent's Excerpt of Record in the Court of Appeals.

vessel "Sea Otter" that occurred when the port holds of the vessel were pumped out by Government officials after the forcible seizure of the vessel. (E.R. page 4-28) (R.T. page 2-3)[2]

Following the district court's denial of the suppression motion on grounds of "standing," respondent entered a conditional plea of guilty to Count Three of the indictment pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. At that time, respondent specifically reserved on appeal, with the concurrence of the Government, the issue of whether he had standing to move to suppress evidence illegally seized from the "Sea Otter" in June, 1979. Respondent was sentenced to three years imprisonment, fined $15,000.00 and ordered to forfeit a ranch and boat that were involved

2. "R.T." refers to Reporter's Transcript of the Record in this case.

the drug smuggling enterprise.[3] The Court of Appeals reversed the District Court's decision on the issue of "standing," and remanded for disposition of respondent's suppression motion on the merits.

In connection with the Government's response to respondent QUINN's motion to suppress, the Government submitted a statement of facts together with the affidavit of Wesley Dyckman, which constituted the record in this case. (E.R. pages 10-12, 22-27).

In 1978, respondent QUINN approached George Hunt in Costa Rica to participate in a scheme to import marijuana by boat from Columbia to Humboldt County, California. Mr. Hunt was to take the vessel owned by respondent, pick up a load of marijuana, bring it to respondent's

3. The government has never contested respondent's "standing" to contest to theforfeiture of the "Sea Otter" which was done as part of the overall resolution of the case.

ranch in Humboldt County, and thereafter off-load the marijuana at the ranch. In this regard, respondent purchased the "Sea Otter," a fishing vessel, in San Diego, California. (E.R. page 23). In connection with the purchase of the "Sea Otter," respondent also registered himself as the owner of the vessel.

In the spring of 1979, respondent provided the "Sea Otter" to three South Americans who had been recruited by Hunt. The Sea Otter then pursuant to the joint venture, took on a load of marijuana off the West Coast of Columbia. Respondent was the co-owner of this marijuana. The "Sea Otter" proceeded North until it was off the coast of Humboldt County. At that time, pursuant to Mr. Hunt's and respondent's previous agreement, Mr. Hunt contacted respondent by radio. The marijuana was subsequently off-loaded at Spanish Flat

in the vicinity of respondent's ranch. Due to bad weather, the ship was forced to port in Drake's Bay. (E.R. page 10,23). At Drake's Bay, California Fish and Game officers boarded the "Sea Otter," purportedly to search for "illegal abalone." The next morning, the officers returned, inspected the vessel, and apparently called the Coast Guard. Thereafter, Customs patrol Officers on board a United States Coast Guard cutter intercepted the "Sea Otter" and boarded it. The vessel was thereafter seized, and taken to the United States Coast Guard Station at Yerba Buena Island. There, the forward holds of the vessel were pumped out and marijuana residue was found. Hunt and the other crew members were arrested, but were later released after formal charges were not brought. (E.R. pages 11-12, 24). Thereafter, the "Sea Otter" underwent extensive repairs

in the Bay Area for approximately nine months. The "Sea Otter" was turned over to respondent in Punta Arenas, Costa Rica in November, 1981.

On August 9, 1983, respondent was arrested while living on board the fishing vessel "Sea Otter", in San Diego, California.

In the district court, respondent filed a motion to suppress evidence obtained as a result of the seizure and search of the "Sea Otter." At that time, the district court denied the motion, finding that respondent lacked standing to contest the search and seizure of the vessel. Additionally, at that time, defense counsel requested an opportunity to call Mr. Hunt as a witness to testify in connection with respondent's standing and expectation of privacy in the vessel. Defense counsel noted that Mr. Hunt was beyond

the subpoena power of respondent at that time, and requested an opportunity to renew that motion when Mr. Hunt became available. A conditional plea of guilty was entered and Mr. Hunt was never brought into the United States.

On appeal, the Panel of the Ninth Circuit reversed the district court's finding. The majority concluded that respondent had demonstrated a legitimate expectation of privacy in the "Sea Otter," which entitled him to challenge the validity of the search. The court based this on the conjunction of the following factors:

(1) His ownership of the boat;

(2) His possessory interest in the marijuana seized;

(3) The fact that the boat was pursuing the purpose of QUINN's joint venture at the time of the search; and

(4) That reasonable precautions were taken to preserve the privacy of the boat.

In accordance with this conclusion, the Court of Appeals remanded the case to the district court for consideration of the merits of respondent's motion to suppress.

REASONS FOR DENIAL OF THE PETITION

(A) THE INSTANT PETITION PREMATURELY RAISES THE ISSUE OF STANDING.

The jurisdiction of the Ninth Circuit Court of Appeals was based upon 28 U.S.C. section 1291 which allows appeals from final decisions. The Court of Appeals remanded the instant case to the district court for further proceedings regarding respondent's motion to suppress evidence. Thus, the review of the instant issue of standing does not meaningfully and timely raise an issue for this Courts review. The case has not been finally decided by the district court on the merits of the motion to suppress evidence. Accordingly, contrary to petitioner's assertion, resolution of the "standing" issue will not necessarily be the end of proceedings in this matter. The Government has concluded that the Govern-

ment's principal witness has left the country and is no longer available to testify.[4] As is evidenced in the dialogue occurring at the time of the motion to suppress evidence, the Government's principal witness was already out of the country and was anticipated to

4. This unfortunate misrepresentation in the Solicitor's brief should be corrected. George Hunt pled guilty before Mr. Quinn's arrest in August 1983, and was sentenced to a probationary sentence. He was permitted to return to Costa Rica, from which he had earlier been extradicted. Hunt was in Costa Rica during the entire pendency of the District Court proceedings in this case. At all times though, and at the present time, Hunt was required pursuant to his plea agreement and as a condition of his probation (a term of five years) to return to the U.S. to testify as a government witness, if necessary, in the trial of Mr. Quinn. Thus, while he is out of the country, he is clearly "available" to testify. Should he refuse, the government can seek recission of his plea agreement or revocation of his probation and activate the extradition process that secured Hunt's initial appearance. Hunt was willing to testify for the government during the District Court proceedings. There is no indication that he has changed his position.

return to the country for the purpose of trial. Thus, circumstances have not changed which render a determination of the instant issue any more final than any other inter-locutory appeal. The Government has also suggested that even if they prevail on the merits of the suppression motion, it would be unable to proceed with the prosecution. This assertion is speculative at best, and again, is contrary to record in the instant case. Finally, if the motion to suppress is granted, the Government will have the oportunity at that time to appeal the instant issue. In light of the total circumstances available, review of the instant issue is premature and therefore certiorari should be denied.

(B) A REVIEW BY THIS COURT WOULD INVOLVE A REVIEW OF A COMPLEX SET OF FACTS AND CIRCUMSTANCES WHICH ARE NOT LIKELY TO RECUR.

The Ninth Circuit rendered its opinion based upon a combination of four specificfactors in existence in this particular case. The court based its opinion not upon the exclusive ownership or the possessory interests in a joint venture, but on a combination of all four factors existing at the time of the search of the "Sea Otter." Contrary to petitioner's contention, this situation is particularly unique to the instant case, and is not likely to recur. Of particular significance is the lack of any other authority dealing with the combination of these four particular factors in a determination of a respondent's reasonable expectation of privacy in the vessel searched.[5]

5. The suggestion that the Court used its limited resources to review fact-bound determination of a unique decision should be rejected.

Petitioner can point to no other cases dealing with such a combinations of factors. All of the opinions cited by Petitioner are distinguishable on these particular factors. Petitioner cites a number of opinions for the proposition that ownership in the vessel alone does not create a reasonable expectation of privacy. Petitioner also cites a number of opinions for the fact that participation in a joint venture alone does not create a reasonable expectation of privacy in the vessel. Finally, Petitioner cites cases to the effect that a possessory interest in the contraband seized, standing alone, does not create a reasonable expectation of privacy. None of these cases deal with the combinations of factors considered in conjunction with the reasonable precautions taken and recognized by the Ninth Circuit as

creating an expectation of privacy in the area searched.

In Rakas v. Illinois, 439 U.S. 128 (1978), the Court noted:

> It should be emphasized that nothing we say here casts the least doubt on cases which recognize that, as a general proposition, the issue of standing involves two inquiries; first, whether the proponent of a particular legal right has alleged 'injury in fact,' and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties.
>
> Rakas v. Illinois, supra, at page 139.

Implicit in all rulings regarding the determination of standing, is that the totality of circumstances must be considered to determine the expectations of privacy exercised by a claimant. The Court of Appeals clearly was proper in applying this Court's decisions

to the facts of this case, eschewing sole reliance on a single factor, and instead evaluating the totality of the circumstances in light of Rakas and Salvucci. Petitioner totally ignores the combination of factors suggested by the Ninth Circuit, in an attempt to convince this Court that certiorari is in order due to a recurring situation. However, the true facts of the case, indicate that this is not a situation likely to recur, but is in fact a particularly unique case where a combination of several, not one, factors indicated a legitimate expectation of privacy in the vessel searched. Absent the recurrence of such factors, the instant petition does not present an important question of law, but rather a unique factual argument which will not have an important impact or precedential value. Accordingly, this does not

present an appropriate case for granting of certiorari.

(C) THE OPINION BELOW DOES NOT CREATE A CONFLICT OF OPINIONS AMONG THE CIRCUITS OR CONFLICT WITH EXISTING LAW OF THIS COURT.

(1) Ownership alone in the place searched is clearly not determinative of the issue of standing. See Rawlings v. Kentucky 448 U.S. 98, 105, 100 S.Ct. 2556, 2561, 65 L.Ed 2d 633 (1980); Mancuse v. DeForte, 392 U.S. 364, 368, 88 S.Ct. 2120, 2123, 20 L.Ed 2d 1154 (1968); Katz v. United States, 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed 2d 576 (1967). However, property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated. United States v. Salvucci, 448 U.S. 83, 91, 100 S.Ct. 2547, 2553, 65 L.Ed. 2d 619 (1980); United States v. Perez, 689 F.2d 1336, 1338, (9th Cir. 1982) (per curiam); United States v. One 1977 Mercedes Benz, 708 F.2d 444 (9th

Cir. 1983). The court in Rakas recognized that expectations of privacy may be legitimized "by reference to concepts of real or personal property law, or to understandings that are recognized and permitted by society", each having varying strength depending upon the circumstances of each case. Rakas, 439 U.S. at 143-44 nt.12, 99 S.Ct. at 430-431 nt.12. For example, the right to exclude others may give rise to a legitimate expectation of privacy and may or may not stem from property interests. Any precautions taken to exclude others or otherwise maintain a privacy interest will heighten the legitimate expectation of privacy in the protected area. See Rawlings, 448 U.S. at 105, 100 S.Ct. at 2561; United States v. Chadwick, 433 U.S. at 11, 97 S.Ct. at 2483.

Essentially a defendant must demon-

strate a violation of his legitimate expectation of privacy in the items seized and in the place searched. This determination involves two inquiries: first whether the defendant has exhibited an actual, subjective expectation of privacy, and second, whether that expectation is one that society is prepared to recognize as reasonable. Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2570, 61 L.Ed.2d, 220 (1979).

A defendant who enters into an arrangement that indicates joint control and supervision of the place searched may challenge a search of the place where contraband is concealed. United States v. Pollock, 726 F.2d 1456 (9th Cir. 1984); United States v. Johns, 707 F.2d 1093, 1099-1100 (9th Cir. 1983).

In United States v. Brown, 743 F.2d 1505 (11th Cir. 1984), the court

noted:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law, or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others.
>
> . . .
>
> Our Circuit has recognized that ownership, or at least the right to exclude others, to control access to the place searched is an important feature of a legitimate privacy expectation.
>
> United States v. Brown. supra, at page 1510.

The cases cited by Petitioner to the effect that ownership alone is not determinative of the issue deal with situations wherein the owner was temporarily excluded. In United States v. Dall, 608 F.2d 910 (1st Cir. 1979), cert. denied 445, U.S. 918, 100 S.Ct.

1280, 63 L.Ed.2d 603 (1980), the court held ownership alone was insufficient to establish an expectation of privacy where the owner of the truck had lent the truck to some friends. The owner disclaimed any knowledge of the contents of the property found in a locked camper on the truck bed and did not allege that he had locked the camper. The court held that when the owner gave possession to another for the other's uses to the temporary exclusion of the owner, he extinguished the expectation of privacy in that truck which would have arisen due to his ownership. Similarly, in United States v. Dyar, 574 F.2d 1385 (5th Cir. 1977) cert. denied 439 U.S. 992, 99 S.Ct. 570, 58 L.Ed.2d 653 (1978), the Fifth Circuit held that defendants who asserted a leasehold interest in an airplane sufficient to create a traditional property

right abandoned any expectation of privacy when they gave possession of the plane to a pilot. Here, the ownership of the property was not the sole basis for respondent's claim of standing. In contrast to the opinions cited by petitioner, not only did respondent exercise an ownership interest in the fishing vessel, but he also demonstrated an expectation of privacy in the uses of the fishing vessel. These factors also should be taken into consideration as well as the efforts made to conceal the contents of the holds of the vessel by flooding it. The instant opinion does not rely exclusively on the ownership of respondent and accordingly does not create a conflict among Circuits or fundamental error which is inconsistent with the prior opinions of this court. Rather, to the contrary the opinion accurately addresses the

previous rulings of the Court.

(2) Petitioner asserts that the Ninth Circuit's consideration of defendant's participation under joint criminal venture creates a conflict between the decisions of Courts of Appeals of the other Circuits. The cases cited are all distinguishable on their face to the extent that each and every case dealt with a claim of standing based exclusively upon the defendant's participation in a joint criminal venture. See, for example, United States v. Manbeck, 744 F.2d 360, 373-374 (4th Cir. 1984) cert. denied, No. 84-1194 (February 19, 1985) (defendant had no standing to contest search of tractor/-trailer and other vehicles based exclusively on their possessory interest in the marijuana and their joint venture in a smuggling operation in which they would share the profits of the marijuana.

No claim of ownership in the vehicle searched, presence at the time of search or other factors were cited by the defendant); United States v. Brown, 744 F.2d 1505, 1506-1507 (11th Cir. 1984) (joint claim of possession in cocaine concealed upon the person of the co-defendant pursuant to the joint actions of both did not create a reasonable expectation of privacy where no expectation of privacy could be asserted in the person of the co-defendant); United States v. Knotts, 662 F.2d 515, 518 (8th Cir. 1981), reversed on other grounds, 460 U.S. 276 (1983) (defendant did not have standing to contest search of co-defendant's cabin where only basis for claim of standing was that he was a co-venturer in a manufacturing venture and asserted a possessory interest in equipment located in the cabin); United States v. DeLeon, 641 F.2d 330,

337 (5th Cir. 1981) (defendant did not have standing to contest search of black bag found in front seat of car in which defendant claimed no interest, and where bag had been taken from defendant who only claimed a possessory interest in the contents of the bag); United States v. Davis, 617 F.2d 677, 690 (D.C. Cir. 1979), cert. denied 445 U.S. 967 (1980) (no standing where defendant argued solely on the interest he claimed as a consignor of cocaine located in the co-defendant's apartment; defendant had consigned the cocaine with the expectation that the drug would be shown to prospective buyers); United States v. Archbold-Newball, 554 F.2d 665, 678 (5th Cir. 1977), cert. denied 434 U.S. 1000 (1977) (no standing where defendant merely asserted a possessory interest in the contraband located during the search

of the co-defendant's hotel room at a time when defendant was not present); United States v. Galante, 547 F.2d 733, 739 (2nd Cir. 1976), cert. denied, 431 U.S. 969 (1977) (no standing in warehouse where no assertion of ownership of warehouse, or proprietary or possessory interest in warehouse and defendant not present at warehouse); United States v. Hunt, 505 F.2d 931 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975) (defendant did not have standing to contest search and seizure of tape recorders where defendants did not even know of existence of tapes at time until after search; based merely upon co-venturer's status).

None of these opinions even purported to address issues of proprietary interest coupled with other factors demonstrating a reasonable expectation in the place to be searched. Rather, all cases

merely addressed the very narrow question of whether a status as a co-venturer in a conspiracy provided them with personal standing within the meaning of the Fourth Amendment. Similarly, the cases cited for the proposition that there is no reasonable expectation of privacy in the hold of a boat do not involve situations in which precautions are taken to conceal the contents thereof. The opinions cited as demonstrated do not create a conflict of law with the instant case, and accordingly, certiorari should not be granted.

Moreover, the decision of the Ninth Circuit is entirely supported by other circuit law. In United States v. Shaefer, Michael & Clairton, 637 F.2d 200 (3d Cir. 1980), defendant, a corporate manufacturer of asphalt paving materials, challenged the search and seizure of five trucks carrying

asphalt. In ruling that the president of the corporation did have a reasonable expectation of privacy in the trucks, the court stated:

> Here, in contrast, Shaefer owns the trucks which were seized, and Clairton Slag, Inc. had at the time of the seizure a possessory interest in them, exercised through its driver agents. Moreover, Clairton had property and possessory interests in the weigh bills which were seized and copied. Neither Clairton's corporate status nor its commercial activity puts is outside the protection of the Fourth Amendment. (citations omitted)

The Government argues that neither defendant was present at the time of the seizure, and thus that neither defendant has a "privacy" interest which was invaded. But the Fourth Amendment's prohibition against seizures of property does not depend upon presence of the owner. The court has repeatedly found Fourth Amendment violations in police intrusion into unoccupied vehicles.

United States v. Shaefer, Michael and Clairton, supra, at page 203.

In United States v. Perez, 689 F.2d 1336 (9th Cir. 1982), the Ninth Circuit consistently held that defendants had standing with respect to a pick-up truck based upon the combined factors of their ownership of the truck, the joint ownership in the contraband found in the truck, the truck was pursuing the purpose of the joint venture and reasonable precautions were taken to maintain the privacy of the truck.

In United States v. Haydel, 649 F.2d 1152 (5th Cir. 1981), the Fifth Circuit noted standing for a defendant in a box of gambling records kept at his parents' house under their bed. The combination of factors of ownership of the box, ownership of the items seized, and the precautions taken to

maintain privacy created a legitimate expectation of privacy within the meaning of the Fourth Amendment. The opinion below is entirely consistent with these cases and is based on the fundamentally sound proposition that no one factor is determinative of the issue of standing.

Petitioner argues that a distinction should be drawn between possessory interests in contraband and non-contraband items with only the latter being recognized as potentially giving rise to an expectation of privacy. The logical application of such a distinction completely defies any manageable application of the Fourth Amendment. To reach a conclusion of standing, the trial court would be compelled to examine the fruits of the search and in essence use the fruits themselves to justify the inapplicability of the Fourth Amendment. Moreover, the trial court would be compelled

to distinguish between mere evidence, instrumentalities, and contraband. Such a distinction has been previously rejected by this Court in Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

Finally, Petitioner suggests that the disposition of the property after the search had occurred should be considered in denying standing. Clearly, the determination of standing should be made at the time of the search and seizure. The fact of a law enforcement search will in many instances influence the subsequent actions taken with respect to certain property. Accordingly, Petitioner has asserted another logically unsound principle for the determination of standing. The only fundamentally correct determination of standing must be based on the totality of all circumstances existing

at the time of the search. The Ninth Circuit opinion below accurately applies this principle consistently with all other circuits and the previous opinions of this court.

CONCLUSION

The present case raises questions turning entirely on the unique facts and circumstances of the vessel, not likely to recur and without any impact outside the limits of this particular case. The opinion below consistently considers all factors known to reach the fundamentally sound conclusion that Respondent had a reasonable expectation of privacy in the "Sea Otter". Finally, in light of the premature nature of the petition, certiorari should be denied.

DATED: 7-1-85.

Respectfully submitted,

EUGENE G. IREDALE
Attorney for Respondent
MICHAEL ROBERT QUINN

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 84-1017

D.C. No. Cr-83-0493-RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of California
Honorable Robert H. Schnacke, Presiding

Argued and Submitted August 7, 1984

[Filed Nov. 2, 1984]

OPINION

Before: **BROWNING**, Chief Judge, **MERRILL** and **SNEED**, Circuit Judges

PER CURIAM.

Quinn appeals from the District Court's pre-trial ruling that he lacks standing to contest the search of his fishing vessel. We reverse. Quinn had a legitimate expectation of privacy in the place searched (his boat), giving him a basis to charge that the search invaded his Fourth Amendment rights and to call for a judicial determination of the validity of this charge. See United States v. Salvucci, 448 U.S. 83, 91-92 (1980); Rakas v. Illinois, 439 U.S. 128, 138-140, 143 (1978). was based on the conjunction of the following: marijuana seized, arising from his joint venture with Hunt for the smuggling of marijuana from the west coast of Columbia to Quinn's ranch in Humboldt County, California. Ownership

of both the place searched and the item seized conferred standing in pre-Rakas cases. See, e.g., United States v. Jeffers, 342 U.S. 48, 49-50, 54 (1951). Dual ownersip remains significant under the expectation of privacy standard. See Salvucci, 448 U.S. at 90-91 n.5; Rakas, 439 U.S. at 136.

(3) The fact that the boat, when searched, was returning from a delivery of marijuana to Quinn and was, thus, pursuing the purpose of Quinn's joint venture. See United States v. Pollack, 726 F.2d 1456, 1465 (9th Cir. 1984); United States v. Johns, 707 F.2d 1093, 1100 (9th Cir. 1983); United States v. Perez, 689 F.2d 1336, 1338 (9th Cir. 1982) (per curiam). Where a joint venture is being pursued, the mere fact that a joint venturer's absence

from the place searched is insufficient to establish abandonment or relinquishment of the property seized. See Johns, 707 F.2d at 1099-1100. Compare United States v. Mendia, 731 F.2d 1412, 1413 (9th Cir. 1984); United States v. One 1977 Mercedes Benz, 708 F.2d 444, 449 (9th Cir. 1983), cert. den. 104 S.Ct. 981 (1984) (no interest in the continuing transport of contraband deriving from a joint venture).

(4) The fact that to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy. Compare Mercedes, 708 F.2d at 449 (contraband was "arguably in plain view").

Reversed and remanded for consideration of the merits of Quinn's motion to suppress.

SNEED, Circuit Judge, Dissenting:

I respectfully dissent. Quinn hoped, and no doubt to some extent expected, that the contraband would remain undetected. That is not enough to entitle him to invoke the protection of the Fourth Amendment. See United States v. Brown, 731 F.2d 1491 (11th Cir. 1984). Rather, the test is whether the expectation that did exist corresponds to that which would have been entertained by a reasonable, but innocent and law abiding, person having the same relationship as did the appellant to the area and objects searched. Only then is the expecatation legitimate. The Fourth Amendment protects the guilty because only by doing so can the innocent be protected. The innocent are not mere incidental beneficiaries of an amendment

designed to protect the guilty. The innocent are its primary beneficiaries; the reasonableness of any expectation of privacy should be ascertained from their stand point.

Approached is this manner, I think the district court was right. Mere ownership of the object and a joint venture to transport non-contraband (lumber, for example) would not lead a reasonable co-owner, who was neither a member of the crew nor a passenger, to expect that any papers or valuables he placed in the hold of the boat would remain private. Our decision in United States v. Johns, 707 F.2d 1093 (9th Cir. 1983), is distinguishable in that there both joint ventures exercised continuing control of the place searched. That is not the case here. This case

falls easily within the reach of United States v. One 1977 Mercedes Benz, 708 F.2d 444 (9th Cir. 1983), cert. den. sub nom. Webb v. United States, 104 S.Ct. 981 (1984).

I would affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1017
D.C. No. Cr83-0493 RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of California

[Filed Feb. 28, 1985]

JUDGEMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudicated by this Court, that the judgement of said District Court in this Cause

be, and hereby is reversed and remanded

A TRUE COPY
ATTEST Feb. 27, 1985
PHILLIP B. WINBERRY
Clerk of Court

by: /s/ Verna Groves
Deputy Clerk

Filed and Entered November 2, 1984

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1017
D.C. No. CR-83-0493 RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELL[EE]

vs.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

[Filed Feb. 1, 1985]

ORDER

Before: **BROWNING**, Chief Judge, **MERRILL** and **SNEED**, Circuit Judges

The panel has voted to deny the petition for rehearing* and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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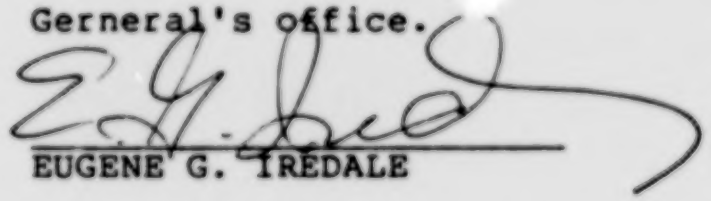
* Judge Sneed voted to grant penal rehearing.

CERTIFICATE OF SERVICE

I, EUGENE G. IREDALE, certify that I am a member of the Bar of the Supreme Court. I represent the respondent MICHAEL QUINN. Pursuant to Rule 28.5(b). I certify that on 1 July, 1985 the Opposition to Government Petition for certiorari was deposited in the U.S. Mail air mail postage prepaid to be served on the Court and the Solicitor's Gerneral's office.



EUGENE G. IREDALE

No. 84-1717 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1717

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In this case, the Ninth Circuit has held that under the Fourth Amendment a defendant has a reasonable and legitimate expectation of privacy in a boat simply on the basis that he is the owner of record of the vessel and is a coventurer in a criminal enterprise involving the use of the ship by others to smuggle drugs in which he has a possessory interest. Respondent was accordingly permitted to challenge the lawfulness of the search of the boat, and thus to seek the suppression of evidence seized during the search, even though it is undisputed that he never personally used the boat or maintained private living quarters or storage space on it, that he purchased the boat for the purpose of having other people use it in connection with a drug smuggling venture, that he was not present on the boat during its voyage or at the time it was searched, and that the boat was out of his custody and control during both the two-month period preceding the search and the two years following the search.

As we demonstrated in the petition, the holding of the Ninth Circuit is fundamentally in error and irreconcilable with the decisions of this Court and of the other courts of appeals. Whether viewed individually or together, the considerations relied on by the court below—a defendant's title to the boat, his stake in the smuggling venture, his possessory interest in the contraband that was seized, and efforts by those on board the boat to conceal the drugs—do not establish that *the defendant* had a Fourth Amendment expectation of privacy in the area searched or that the government's action implicated *his* personal right to be free from unreasonable searches and seizures. We add the following comments in reply to respondent's brief in opposition.

1. Respondent contends (Br. in Opp. 13-17) that the court of appeals' decision does not state a legal rule but instead is a factual determination based on a totality of factors that are unique to this case and unlikely to arise in the future. This characterization is incorrect. The court's holding does not involve a discretionary weighing of variables that turns on the specific facts presented and is not amenable to a legal standard. Rather, it sets forth a general principle of law that is applicable in all like cases.

Nor is it correct that the circumstances of this case are unique and unlikely to be repeated. Quite the contrary: as indicated by the cases we have cited (Pet. 9-19), the issue of the Fourth Amendment rights of an absentee owner and co-venturer is a recurring one. Moreover, as in this case, the beneficiary of the ruling below will frequently be the leader or "kingpin" of smuggling operations, who typically purchases a conveyance for others to use to transport contraband in which he has a possessory interest. Accordingly, the question presented is of substantial importance to the administration of criminal justice.

2. The cases from other circuits upon which respondent relies (Br. in Opp. 27-30) do not support the court of appeals' decision here. In *United States* v. *Shaefer*, 637 F.2d 200, 203 (3d Cir. 1980), a corporation and its president were found to have "standing" to challenge the stop and search of trucks owned by the president and used by the company. In *United States* v. *Haydel*, 649 F.2d 1152, 1154-1156, modified, 664 F.2d 84 (5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982), the court held that the defendant could contest a search of his parents' house because he had been given permission to use the house and had unencumbered access to it, he had stayed in the house overnight at various times and kept clothes and gambling records there, and he was often on the premises and conducted a significant portion of his gambling activities at the house. Neither of these decisions addresses the issue in this case: the Fourth Amendment rights of one who holds bare title to the searched property but has never made use of it and had relinquished all custody and control to others for a substantial period of time when the search occurred. Nothing in those cases gives rise to a privacy interest on the part of respondent in the circumstances presented here.

3. Respondent also argues (Br. in Opp. 10-12) that this case is interlocutory and hence unsuited for review because the court of appeals remanded to the district court to consider the merits of his motion to suppress, as to which the government may still prevail. But this argument ignores the fact that the court of appeals' decision has the effect of vacating respondent's conditional guilty plea to the charges against him (see Pet. 2, 21 n.10), which plea is not subject to reinstatement in the event the suppression motion is denied on the merits. As in any case in which a plea of guilty is set aside on appeal, the ruling here is final rather than interlocutory with respect to the disposition of the case on the basis of the plea. An appellate decision upsetting a final and

conclusive judgment of conviction entered by the district court can hardly be considered interlocutory merely because it has the consequence of requiring further proceedings in lieu of those that resulted in the existing determination of guilt. If we are correct that the Ninth Circuit's decision is erroneous, the government is entitled to the benefit of its bargain that resolves the charges once and for all. Furthermore, our opportunity to seek review of the holding in this case may be lost entirely if, for example, the government prevails on the merits of the suppression motion and respondent is subsequently acquitted. See *California* v. *Stewart* (joined with *Miranda* v. *Arizona*), 384 U.S. 436, 498 n. 71 (1966). Accordingly, the posture of the case provides no ground for denying our petition and deferring review of the "standing" issue pending remand.*

---

*The posture of this case is thus quite different from what it would be had respondent already been convicted at trial following denial of his suppression motion. If the court of appeals remanded such a case for further proceedings respecting the suppression motion, the matter would be truly interlocutory: either the motion would be denied, the conviction would stand, and the "standing" issue would be moot, or the motion would be granted and the government could appeal. In neither circumstance would the government be exposed in a case like that to the risk of losing its conviction and having a retrial that could lead to a potentially unreviewable acquittal.

The petition also noted (at 21 n.10) that we had been advised by the United States Attorney that the government's principal witness was no longer available to testify at trial and that the prosecution therefore could not proceed even if the government prevailed on the merits of the suppression motion. This assessment was based on the fact that the witness had left the country and had not been in contact with the prosecutor for two years. The United States Attorney now informs us, however, that, as respondent points out (Br. in Opp. 11 n.4), it is a condition of the witness's plea agreement and probation that he return to testify in this case if necessary. At this juncture, the United States Attorney simply does not know whether the witness will in fact be available to testify. Whatever the ultimate resolution of this matter, however, it in no way detracts from our submission that the legal issue raised here warrants certiorari and that review at the present time is appropriate.

For the foregoing reasons and those stated in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted. As suggested in the petition, the Court may wish to consider summary reversal.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985

No. 84-1717

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MAY 2, 1985
CERTIORARI GRANTED OCTOBER 15, 1985

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* The opinion of the court of appeals appears at pp. 1a-4a of the appendix to the petition for a writ of certiorari and the oral ruling of the district court on the "standing" issue appears at pp. 7a-9a of the petition. These have not been reproduced here.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. CR-83-0493-01-RHS

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

MICHAEL ROBERT QUINN,
DEFENDANT.

RELEVANT DOCKET ENTRIES

Date	Proceedings
August 4, 1983	1 – Filed indictment (Dkt'd 08/09/83).
August 4, 1983	1 – Case assigned to JUDGE SCHNACKE (Dkt'd 08/09/83).
August 4, 1983	1 – US Attorney NERNEY, D MICHAEL added to case (Dkt'd 08/09/83).
August 4, 1983	1 – Bench warrant issued (Dkt'd 08/09/83).
August 4, 1983	1 – Order surety/cash bail set in the amount of $500,000.00 (JUDGE SCHNACKE) (Dkt'd 08/09/83).
August 5, 1983	2 – Subpoena (s) returned executed (TO: GEORGE MAYBERRY HUNT – 08/04/83.) (Dkt'd 08/09/83).
August 8, 1983	2 – Defendant arrested (Dkt'd 08/16/83).
August 9, 1983	3 – Order filed (ORDER UNSEALING INDICTMENT.) (JUDGE SCHNACKE) (Dkt'd 08/09/83).

August 15, 1983—4—Bench warrant returned executed, executed on 08/08/83 (Dkt'd 08/16/83).

August 26, 1983—5—Received documents transferred pursuant to Rule 40 from 0974 (Dkt'd 09/01/83).

September 2, 1983—6—Minute sheet filed (REPORTER: BARBARA STOCKFORD.) (JUDGE SCHNACKE) (Dkt'd 09/06/83).

September 2, 1983—6—Arraignment held (Counts 1,2,3,4) (JUDGE SCHNACKE) (Dkt'd 09/06/83).

September 2, 1983—6—Defendant's first appearance (JUDGE SCHNACKE) (Dkt'd 09/06/83).

September 2, 1983—6—Defendant enters plea of not guilty (Counts 1,2,3,4) (JUDGE SCHNACKE) (Dkt'd 09/06/83).

September 2, 1983—6—Hearing on pre-trial motions set for 10/21/83 @ 9:30 AM (Counts 1,2,3,4) (JUDGE SCHNACKE) (Dkt'd 09/06/83).

September 2, 1983—6—Trial date set for 11/21/83 @ 10:00 AM (Counts 1,2,3,4) (JUDGE SCHNACKE) (Dkt'd 09/06/83).

September 6, 1983—7—Received documents transferred pursuant to Rule 40 from 0974 (Dkt'd 09/08/83).

October 18, 1983—8—Notice filed (DEFENDANT'S NOTICE OF RELATED CASE.) (Dkt'd 10/18/83).

October 18, 1983—9—EXHIBITS TO NOTICE OF RELATED CASE. (Dkt'd 10/18/83).

October 18, 1983—10—Order filed (ORDERED: THAT THIS CASE IS NOT RELATED TO CR-81-0030 RPA.) (JUDGE AGUILAR) (Dkt'd 10/18/83).

October 18, 1983—11—Motion for discovery/inspection filed (MOT#1) (Counts 1,2,3,4) (DEFENDANT'S MOTION FOR DISCOVERY.) (Dkt'd 10/18/83).

October 18, 1983—11—Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTED on 10/18/83)) (Dkt'd 10/18/83).

October 18, 1983—12—Memorandum in support of motion for discovery/inspection (MOT #1) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DISCOVERY.) (Dkt'd 10/18/83).

October 18, 1983—13—Motion filed (MOT #2) (NOTICE OF MOTION AND MOTION FOR PRESERVATION AND PRODUCTION OF ROUGH NOTES OF PROSECUTION WITNESS INTERVIEWS, OR IN THE ALTERNATIVE FOR SANCTIONS FOR DESTRUCTION OF ANY NOTES.) (Dkt'd 10/18/83).

October 18, 1983—13—Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83).

October 18, 1983—14—Memorandum in support of motion (MOT #2) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRESERVATION AND PRODUCTION OF ROUGH NOTIES OF PROSECUTION WITNESS INTERVIES OR IN THE ALTERNATIVE, SANCTIONS FOR DESTRUCTION OF ANY NOTES.) (Dkt'd 10/18/83).

October 18, 1983—15—Motion filed (MOT #3) (DEFENDANT'S MOTION FOR PRETRIAL ACCESS TO WITNESSES.) (Dkt'd 10/18/83).

October 18, 1983—15—Mark the beginning of a potential excludable period for type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83).

October 18, 1983—16—Memorandum is support of motion (MOT #3) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRE-TRIAL ACCESS TO WITNESSES.) (Dkt'd 10/18/83).

October 18, 1983 – 17 – Motion filed (MOT #4) (DEFT's MOTION TO REQUEST NOTICE OF THE GOVERNMENT'S INTENTION TO USE EVIDENCE AT TRAIL UNDER RULE 12(B) (2) OF THE F.R.CR.P.) (Dkt'd 10/18/83).

October 18, 1983 – 17 – Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83).

October 18, 1983 – 18 – Motion filed (MOT #6) (NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS.) (Dkt'd 10/18/83).

October 18, 1983 – 18 – Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83).

October 18, 1983 – 19 – Motion filed (MOT #6) (NOTICE OF MOTION AND MOTION FOR PROVISION OF BRADY MATERIAL AND DISCLOSURE OF IMPEACHING INFORMATION.) (Dkt'd 10/18/83).

October 18, 1983 – 19 – Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83).

October 18, 1983 – 20 – Memorandum in support of motion. (MOT #6) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROVISION OF BRADY MATERIAL AND DISCLOSURE OF IMPEACHING INFORMATION.) (Dkt'd 10/18/83).

October 18, 1983 – 21 – Motion filed (MOT #7) (DEFENDANT'S NOTICE OF MOTION AND MOTION FOR PRETRIAL CONFERENCE.) (Dkt'd 10/18/83).

October 18, 1983 – 21 – Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83).

October 18, 1983 – 22 – Memorandum in support of motion (MOT #7) (MEMORANDUM OF (MOT #1) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DISCOVERY.) (Dkt'd 10/18/83.)

October 18, 1983 – 13 – Motion filed (MOT #2) (NOTICE OF MOTION AND MOTION FOR PRESERVATION AND PRODUCTION OF ROUGH NOTES OF PROSECUTION WITNESS INTERVIEWS, OR IN THE ALTERNATIVE FOR SANCTIONS FOR DESTRUCTION OF ANY NOTES.) (Dkt'd 10/18/83.)

October 18, 1983 – 13 – Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983 – 14 – Memorandum in support of motion. (MOT #2) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRESERVATION AND PRODUCTION OF ROUGH NOTIES OF PROSECUTION WITNESS INTERVIES OR IN THE ALTERNATIVE, SANCTIONS FOR DESTRUCTION ON ANY NOTES.) (Dkt'd 10/18/83.)

October 18, 1983 – 15 – Motion filed (MOT #3) (DEFENDANT'S MOTION FOR PRETRIAL ACCESS TO WITNESSES.) (Dkt'd 10/18/83.)

October 18, 1983 – 15 – Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983 – 16 – Memorandum in support of motion. (MOT #3) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRE-TRIAL ACCESS TO WITNESSES.) (Dkt'd 10/18/83.)

October 18, 1983–17–Motion filed (MOT #4) DEFT'S MOTION TO REQUEST NOTICE OF THE GOVERNMENT'S INTENTION TO USE EVIDENCE AT TRAIL UNDER RULE 12(B) (2) OF THE F.R. CR.P.) (Dkt'd 10/18/83.)

October 18, 1983–17–Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983–18–Motion filed (MOT #6) (NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS.) (Dkt'd 10/18/83.)

October 18, 1983–18–Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983–19–Motion filed (MOT #6) (NOTICE OF MOTION AND MOTION FOR PROVISION OF BRADY MATERIAL AND DISCLOSURE OF IMPEACHING INFORMATION.) (Dkt'd 10/18/83.)

October 18, 1983–19–Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983–20–Memorandum in support of motion (MOT #6) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROVISION OF BRADY MATERIAL AND DISCLOSURE OF IMPEACHING INFORMATION.) (Dkt'd 10/18/83.)

October 18, 1983–21–Motion filed (MOT #7) (DEFENDANT'S NOTICE OF MOTION AND MOTION FOR PRETRIAL CONFERENCE.) (Dkt'd 10/18/83.)

October 18, 1983–21–Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFOD on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983–22–Memorandum in support of motion (MOT #7) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRETRIAL CONFERENCE.) (Dkt'd 10/18/83.)

October 18, 1983–23–Motion for a bill of particulars filed (MOT #8) (Counts 1,2,3,4) (DEFENDANT'S NOTICE OF MOTION AND MOTION FOR BILL OF PARTICULARS.) (Dkt'd 10/18/83.)

October 18, 1983–23–Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFBP on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983–24–Memorandum in support of motion for a bill of particulars (MOT #8) (Dkt'd 10/18/83.)

October 18, 1983–25–Motion to produce/inspect grand jury testimony filed (MOT #9) (Counts 1,2,3,4) (MOTION FOR DISCLOSURE OF INFORMATION REGARDING THE GRAND JURY.) (Dkt'd 10/18/83.)

October 18, 1983–25–Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFGJ on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983–26–Memorandum in support of motion to produce/inspect grand jury testimony (MOT #9) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DISCLOSURE OF INFORMATION REGARDING THE GRAND JURY.) (Dkt'd 10/18/83.)

October 18, 1983–27–Motion to suppress evidence filed (MOT #10) (Counts 1,2,3,4) (Dkt'd 10/18/83.)

October 18, 1983–27–Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFSE on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983—28—Memorandum in support of motion to suppress evidence (MOT #10) (Dkt'd 10/18/83.)

October 18, 1983—29—Motion to reveal identity of informant filed (MOT #11) (Counts 1,2,3,4) (NOTICE OF MOTION AND MOTION FOR REVELATION OF IDENTITY OF INFORMANTS.) (Dkt'd 10/18/83.)

October 18, 1983—29—Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFID on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983—30—Memorandum in support of motion to reveal identity of informant (MOT #11) (MEMORANDUM OF POINTS AND AUTHORIES IN SUPPORT OF MOTION TO ORDER THE DISCLOSURE OF THE INDENTITY OF THE INFORMANTS.) (Dkt'd 10/18/83.)

October 18, 1983—31—Motion for preservation of evidence filed (MOT #12) (Counts 1,2,3,4) (NOTICE OF MOTION AND MOTION REGARDING THE DESTRUCTION OF EVIDENCE.) (Dkt'd 10/18/83.)

October 18, 1983—31—Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFPE on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983—32—Memorandum in support of motion for preservation of evidence (MOT #12) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION REGARDING DESTRUCTION OF EVIDENCE.) (Dkt'd 10/18/83.)

October 18, 1983—33—Motion to dismiss filed (MOT #13) (Counts 3-4) (MOTION TO DISMISS COUNTS 3 & 4.) (Dkt'd 10/18/83.)

October 18, 1983—33—Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFDC on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983—34—Memorandum in support of motion to dismiss (MOT #13) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISSMISS COUNTS 3 & 4.) (Dkt'd 10/18/83.)

October 18, 1983—35—Motion to dismiss filed (MOT #14) (Counts 1,2,3,4) (NOTICE OF MOTION AND MOTION TO DISMISS INDICTMENT FOR PRE-INDICTMENT DELAY.) (Dkt'd 10/18/83.)

October 18, 1983—35—Mark the beginning of a potential excludable period of type X-E starting on 10/18/83 ((In re MOTFDC on 10/18/83)) (Dkt'd 10/18/83.)

October 18, 1983—36—Memorandum in support of motion to dismiss (MOT #14) (MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR PRE-INDICTMENT DELAY.) (Dkt'd 10/18/83.)

October 18, 1983—37—CERTIFICATE OF SERVICE OF VARIOUS MOTIONS. (Dkt'd 10/18/83.)

October 18, 1983—38—GOVERNMENT'S OPPOSITION TO NOTICE OF RELATED CASE RE CR 83-493 RHS & CR 81-30 RPA) (Dkt'd 10/18/83.)

October 21, 1983—39—Minute sheet filed (REPORTER: BARBARA STOCKFORD.) (JUDGE SCHNACKE (Dkt'd 10/24/83.)

October 21, 1983—39—Hearing on pre-trial motions continued to 11/18/83 @ 9:30 AM. (Counts 1,2,3,4) (JUDGE SCHNACKE) (Dkt'd 10/24/83).

October 21, 1983—39—Trial date continued to 12/19/83 @ 10:00 AM (Counts 1,2,3,4) (JUDGE SCHNACKE) (Dkt'd 10/24/83).

October 21, 1983—39—Excludable delay based on finding the ends of justice served by continuance began on 10/21/83 and ended on 11/18/83 (JUDGE SCHNACKE) (Dkt'd 10/24/83).

November , 1983–40–Answer to motion for discovery/inspection (MOT #1) (Dkt'd 11/10/83).

November , 1983–40–Answer to motion to produce/inspect grand jury testimony (MOT #9) (Dkt'd 11/10/83).

November , 1983–40–Answer to motion for a bill of particulars (MOT #8) (Dkt'd 11/10/83).

November , 1983–40–Answer to motion to dismiss (MOT #13) (Dkt'd 11/10/83).

November , 1983–40–Answer to motion to dismiss (MOT #14) (Dkt'd 11/10/83).

November , 1983–40–Answer to motion to suppress evidence (MOT #10) (Dkt'd 11/10/83).

November , 1983–40–Answer to motion (MOT #2) (Dkt'd 11/10/83).

November 16, 1983–41–GOVERNMENT'S DECLARATION OF WESLEY DYCKMAN IN OPPOSITION OF DEFT'S OMNIBUS MOTIONS (Dkt'd 11/16/83).

November 19, 1983–42–Minute sheet filed (REPORTER BARBARA STOCKFORD) (JUDGE SCHNACKE) (Dkt'd 11/21/83).

November 19, 1983–42–Hearing on pre-trial motion held 11/18/83 (Count 1-4) (Dkt'd 11/21/83).

November 19, 1983–42–Motion to suppress evidence denied. (MOT #10) (JUDGE SCHNACKE) (Dkt'd 11/21/83).

November 19, 1983–42–Excludable delay due to hearings on Pretrial Motions began on 10/18/83 and ended on 11/18/83 (Dkt'd 11/21/83).

November 19, 1983–42–Motion for a bill of particulars granted in part: denied in part (MOT #8) (JUDGE SCHNACKE) (Dkt'd 11/21/83).

November 19, 1983–42–Excludable delay due to hearings on Pretrial Motions began on 10/18/83 and ended on 11/18/83 (Dkt'd 11/21/83).

November 19, 1983–42–Motion to dismiss denied (MOT #13) (JUDGE SCHNACKE) (Dkt'd 11/21/83).

November 19, 1983–42–Excludable delay due to hearings on Pretrial Motions began on 10/18/83 and ended on 11/18/83 (Dkt'd 11/21/83).

November 23, 1983–43–GVT'S BILL OF PARTICULARS. (Dkt'd 11/25/83).

December 16, 1983–44–Filed government's proposed jury instructions (Counts 1-4) (Dkt's 12/19/83).

December 17, 1983–45–Minute sheet filed (REPORTER BARBARA STOCKFORD) (JUDGE SCHNACKE) (Dkt'd 12/19/83).

December 17, 1983–45–Hearing for possible change of plea held (Count 3) (Dkt'd 12/19/83).

December 17, 1983–45–Defendant enters plea of guilty (Count 3) (JUDGE SCHNACKE) (Dkt'd 12/19/83).

December 17, 1983–46–APPLICATION FOR PERMISSION TO ENTER PLEA OF GUILTY (Dkt'd12/19/83).

December 17, 1983–46–Excludable delay due to hearings on Pretrial Motions began on 10/18/83 and ended on 12/19/83 (Dkt'd 12/19/83).

December 17, 1983–46–Excludable delay due to hearings on Pretrial Motions began on 10/18/83 and ended on 12/19/83 (Dkt'd 12/19/83).

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December 17, 1983—46—Excludable delay due to hearings on Pretrial Motions began on 10/18/83 and ended on 12/19/83 (Dkt'd 12/19/83).

December 17, 1983—46—Motion made in open court to dismiss (MOT #15) (Counts 1-2,4) (Dkt'd 12/19/83).

December 17, 1983—46—Motion to dismiss taken under advisement (MOT #15) (JUDGE SCHNACKE) (Dkt'd 12/19/83).

December 17, 1983—46—Mark the beginning of a potential excludable period of type X-G starting on 12/19/83 ((In re MOTADVDC on 12/19/83)) (Dkt'd 12/19/83).

December 17, 1983—46—Order cause referred to the probation department for a pre-sentence investigation. (Count 3) (JUDGE SCHNACKE) (Dkt'd 12/19/83).

December 17, 1983—47—LETTER FROM US ATTY NERNEY TO DEFENSE COUNSEL RE: PLEA AGREEMENT (Dkt'd 12/19/83).

December 17, 1983—48—Order filed (RE: TRAVEL OF DFT TO PORTLAND AND MINNEAPOLIS) (MAGISTRATE BRENNAN) (Dkt'd 12/20/83).

December 29, 1983—49—Notice filed (JOINT NOTICE OF RELATED CASE TO C83-6070RPA) (Dkt'd 12/30/83).

January 16, 1984—50—Notice filed (RE: RELATING CASE C84-0189SW) (Dkt'd 01/17/84).

January 16, 1984—51—Order filed (CASE IS DEEMED RELATED TO C83-6070 RPA.) (JUDGE SCHNACKE) (Dkt'd 01/25/84).

January 20, 1984—52—Minute sheet filed (REPORTER: B. STOCKFORD) (JUDGE SHCNACKE) (Dkt'd 01/26/84).

January 20, 1984—52—Motion to dismiss granted. (MOT #15) (JUDGE SCHNACKE) (Dkt'd 01/26/84).

January 20, 1984—52—Dismissed (Counts 1-2,4) (JUDGE SCHNACKE) (Dkt'd 01/26/84).

January 20, 1984—52—Sentencing of defendant (Count 3) (3 YEARS CUSTODY OF A.G. $15,000 FINE.) (JUDGE SCHNACKE) (Dkt'd 01/26/84).

January 20, 1984—52—Been exonerated (JUDGE SCHNACKE) (Dkt'd 01/26/84).

January 20, 1984—53—Issued judgment and commitment to U.S. Marshal (Count 3) (ENTERED 01/26/84. COPIES TO COUNSEL) (JUDGE SCHNACKE) (Dkt'd 01/26/84).

January 20, 1984—53—Attorney IREDALE, EUGENE G added to case (Dkt'd 01/26/84).

January 25, 1984—54—Filed notice of appeal (Count 3) (APPL #1) (USCA APPEAL NUMBER #84-1017. DEFENDANT'S APPEAL FROM ORDER DENYING MOTION TO SUPPRESS.) (Dkt'd 02/01/84).

January 25, 1984—56—Magistrate's criminal minutes filed. (MAGISTRATE LANGFORD) (Dkt'd 01/26/84).

January 25, 1984—56—Bail hearing held (MOTION FOR BAIL PENDING APPEAL.) (MAGISTRATE LANGFORD) (Dkt'd 01/26/84).

January 25, 1984—56—Excludable delay due to hearings on Pretrial Motions began on 01/25/84 and ended on 01/25/84 (Dkt'd 01/26/84).

January 25, 1984—56—Motion made in open court for bail pending appeal (MOT #16) (MAGISTRATE LANGFORD) (Dkt'd 01/26/84).

January 25, 1984—56—Motion for bail pending appeal denied (MOT #16) (MAGISTRATE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1017

UNITED STATES OF AMERICA,
PLAINTIFF/APPELLEE,

v.

MICHAEL ROBERT QUINN,
DEFENDANT/APPELLANT.

(Notice of Appeal filed January 25, 1984)

RELEVANT DOCKET ENTRIES

Date Proceedings

August 9, 1984—Recvd letter dated August 9, from (S.Svetcov, counsel for aple) re: additional citations. (8/9) (Panel) tsp

August 15 1984—Recvd letter dated August 13, from (E. G. Iredale, counsel for aplt) re: additional citations. (8/13) (Panel) tsp

August 22, 1984—Recvd letter dated Aug. 20, from (S. Svetcov, counsel for aple) re: additional citations. (8/20) (Panel) tsp

October 23, 1984—R'cvd appellee's additional citation. (Panel) 10/22 ogm

November 2, 1984—ORDERED OPINION (MERRILL) FILED AND JUDGMENT TO BE FILED AND ENTERED.

November 2, 1984—FILED OPINION (PER CURIAM)—REVERSED AND REMANDED. (JUDGE SNEED DISSENTING)

November 2, 1984—FILED AND ENTERED JUDGMENT. EM JS/34

November 13, 1984—Filed motion/Order (Dep. Clk.) granting aple 30 day ext. of time to file petition for rehearing and suggestion for rehearing en banc to Dec. 16, 1984. -ot-

December 14, 1984—Filed aple motion for ext of time to file a petition for rehearing and suggestion for rehearing en banc. 12/13 (panel) -vt-

December 19, 1984—Rec'd orig & 33 copies of aples petition for rehearing with suggestion for rehearing en banc. 12/18 15p (panel) -vt-

December 28, 1984—Filed Order (BROWNING, MERRILL and SNEED) granting the motion for extension of five days to file the petition for rehearing and suggestion for rehearing *en banc*. mb

January 8, 1985—as of 12/28 Filed aples petition for rehearing with suggestion for rehearing en banc. (All active) per order of 12/28/84 -vt-

February 1, 1985—Filed Order (BROWNING, MERRILL and SNEED) denying the petition for rehearing and rejecting the suggestion for a rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. app. P. 35(b). mb

February 27, 1985—MANDATE ISSUED [RECALLED 3/14/85]

February 26, 1985—Rec'd aple motion to stay mandate. (case file) -vt-

Feburary 26, 1985—Filed aple motion to recall the mandate for thirty-three days pending filing for cert. (Merrill) 2/28 -vt-

March 14, 1985—Filed Order (MERRILL, CJ) It is ordered that the mandate be recalled and stayed to and including April 2, 1985. mb

April 3, 1985—Filed aplt's motion for a thirty-day stay of mandate pending application for certiorari. (4/3) (MERRILL) EM

April 16, 1985—Filed Order (MERRILL) The stay heretofore granted for issuance of mandate to and including April 2, 1985, is extended to May 2, 1985. mb

May 9, 1985—Recvd SC notice of filing of cert on 5/2/85, SC# 84-1717. EM

October 21, 1985—Filed cert copy of SC order of Oct. 15, 1985 granting cert. #84-1717 (Panel) -ot-

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

MICHAEL ROBERT QUINN,

DEFENDANTS.

Criminal No.

VIOLATIONS: Title 21, United States Code, Section 952 (a)—IMPORTATION OF MARIJUANA: Title 21 § 841(a)(1)—POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA: Title 21 § 963—CONSPIRACY TO IMPORT MARIJUANA; Title 21 § 846—CONSPIRACY TO DISTRIBUTE MARIJUANA

INDICTMENT

COUNT ONE: (21 U.S.C., § 952(a))

The Grand Jury charges: THAT

On or about June 23, 1979, in the County of Humboldt, State and Northern District of California,

MICHAEL ROBERT QUINN,

defendant herein, did knowingly and intentionally import into the United States from a place outside thereof approximately 12,000 pounds of marijuana (a Schedule 1 controlled substance), in violation of Title 21, United States Code, Section 952(a).

COUNT TWO: (21 U.S.C. § 841(a)(1))

The Grand Jury further charges: THAT

On or about June 23, 1979, in the County of Humboldt, State and Northern District of California,

MICHAEL ROBERT QUINN,

defendant herein, did knowingly and intentionally possess with intent to distribute approximately 12,000 pounds of marijuana (a Schedule 1 controlled substance), in violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE: (21 U.S.C., § 963)

The Grand Jury further charges: THAT

Beginning at a time unknown to the Grand Jury and continuing up to and including June 23, 1979, in the State and Northern District of California, and in foreign countries, including Columbia, Costa Rica, and Mexico,

MICHAEL ROBERT QUINN,

defendant herein, did knowingly and intentionally combine, conspire, and agree with other persons, both known and unknown to the Grand Jury, to commit an offense against the United States, to wit, the knowing and intentional importation of marijuana (a Schedule 1 controlled substance), in violation of Title 21, United States Code, Section 963.

COUNT FOUR: (21 U.S.C., § 846)

The Grand Jury further charges: THAT

Beginning at a time unknown to the Grand Jury and continuing up to and including June 23, 1979, in the State and Northern District of California, and in foreign countries, including Columbia, Costa Rica, and Mexico,

MICHAEL ROBERT QUINN,

defendant herein, did knowingly and intentionally combine, conspire, and agree with other persons, both known and unknown to the Grand Jury, to commit an offense against the United States, to wit, the knowing and intentional possession of marijuana (a Schedule 1 controlled

substance), with intent to distribute it in violation of Title 21, United States Code, Section 841(a)(1), all in violation of Title 21, United States Code, Section 846.
DATED: 4 AUG 1984

A True Bill.

_____
FOREPERSON

_____
JOSEPH P. RUSSONIELLO
United States Attorney

(Approved as to Form) DMN
AUSA:NERNEY

December 19, 1983

Eugene G. Iredale, Esq.
625 Broadway
Suite 1021
San Diego, California 92101

RE: United States v. Michael Robert Quinn
No. CR-83-0493-RHS USDC ND Calif.

United States v. One Fishing Vessel Named "SEA OTTER" No. C-831468 S (M) USDC SD Calif.

United States v. The Quinn Ranch Consisting of 220 Acres In Humboldt County, California, etc., No. C-83 USDC ND Calif.

Dear Mr. Iredale:

This will confirm our understanding of the terms and conditions by which the above three cases will be resolved:

The Criminal Case

1. Michael Robert Quinn will enter a conditional plea of guilty to Count Three of the Indictment (21 U.S.C. § 963) under F. R. C. P. Rule 11(a)(2) in order to preserve his right to appeal the District Court's decision that he had no standing to contest the search of the "SEA OTTER." The defendant's appeal will be limited to that one issue.

2. The United States at the time of judgment and sentence will move to dismiss counts One, Two and Four of the Indictment. The United States will affirmatively recommend that the defendant not receive more than one year in prison and will not object to a sentence under 18 U.S.C. § 4205(f). However, it is understood that the Court is not bound by the recommendation of the United States and may impose any sentence within the statutory limits.

3. The United States will not oppose the motion of the defendant to remain at large on his own recognizance while he pursues his appeal to the Ninth Circuit Court of Appeals.

4. The United States will not seek to prosecute the defendant for any offenses of which it is now aware that took place within the Northern District of California.

The Foreiture Action Against the "SEA OTTER"

1. The Defendant Quinn, who is the claimant and owner of record of the "SEA OTTER" in the present action against the vessel in the Southern District of California, will join in a motion that the case be transferred to the Northern District of California under 28 U.S.C. § 1404(a).

2. The Defendant Quinn will thereafter sign a "Joint Notice of Related Case" so that the civil forfeiture action against the defendant vessel may be related to the present criminal case against him in the Northern District of California.

3. The Defendant Quinn will thereafter sign a consent judgment in favor of the United States to be filed before judgment and sentence in the criminal case wherein he relinquishes all right and title to the "SEA OTTER."

4. It is understood that a favorable decision to the Defendant Quinn in his appeal of the District Court's decision as to his standing to contest the search of the "SEA OTTER" in the criminal case will *not* affect the forfeiture of the "SEA OTTER".

The Forfeiture Action Against the Quinn Ranch

1. The Defendant Quinn, who is the claimant and owner of record of the approximate 220 acres in Humboldt County, California, referred to as the "Quinn Ranch", will sign a "Joint Notice of Related Case" so that the civil forfeiture against the approximate 220 acres will be related to the present criminal case against him.

2. The Defendant Quinn will thereafter sign a consent judgment in favor of the United States to be filed before judgment and sentence in the criminal case wherein he relinquishes all right and title to 200 of the approximate 220 acres. Such 20 acres will be located on the periphery, and it is understood that such compromise or settlement does not create any easement or right of ingress or egress over the 200 acres forfeited to the government.

3. During the pendency of the appeal in the criminal case, the Defendant Quinn agrees to continue to make timely payment of all loans or encumberances against the defendant real estate and improvements thereon, and he also agrees to continue in force all insurance policies covering the real estate and improvements thereon. The Defendant Quinn will be reimbursed for all such payments accruing and paid on or after December 19, 1983 if he does not prevail on appeal in the criminal case. Such payment will be made out of the proceeds of the sale of the defendant real estate after the payment of all prior lienholders.

4. The Defendant Quinn also agrees to sign a stipulation relieving the United States Marshal of all responsibility to maintain and protect the defendant real estate and improvements thereon during the pendency of the appeal in the criminal case.

5. Should the Defendant Quinn prevail on appeal in the criminal case, the United States will join in a motion that the consent judgment against the defendant real estate be set aside.

If you and your client agrees with the above terms and conditions, please have Mr. Quinn sign the original of this letter as well as yourself and return it to us.

Very truly yours,

JOSEPH P. RUSSONIELLO
United States Attorney

By: _____
DENNIS MICHAEL NERNEY
Assistant United States Attorney

APPROVED:

_____
MICHAEL ROBERT QUINN

_____
EUGENE G. IREDALE
Attorney for Michael Robert Quinn

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(HON. ROBERT H. SCHNACKE)

Case No. 83-0493

NOTICE OF MOTION AND MOTION
TO SUPPRESS EVIDENCE

UNITED STATES OF AMERICA,
PLAINTIFF,

V.

MICHAEL ROBERT QUINN,
DEFENDANT.

TO: JOSEPH P. RUSSONIELLO, UNITED STATES ATTORNEY, and DENNIS MICHAEL NERNEY, ASSISTANT UNITED STATES ATTORNEY

PLEASE TAKE NOTICE that on Friday, 21 October 1983 at 9:30 a.m. or as soon thereafter as counsel may be heard, the defendant, Michael Robert Quinn, by and through his attorney, Eugene G. Iredale, will move this court to order a suppression of evidence seized as a result of the search of the vessel "The Sea Otter" which occurred in June, 1979.

This motion is based on the instant Motion, the attached Memorandum of Points and Authorities, the files and records of the case, and any and all matters which may come to the court's attention prior to or during the hearing of the instant motion.

Dated: 10 Oct 1983

Respectfully submitted,

_____
EUGENE G. IREDALE
Attorney for Defendant
MICHAEL ROBERT QUINN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(HON. ROBERT H. SCHNACKE)

CASE NO. 83-0493

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO SUPPRESS

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

MICHAEL ROBERT QUINN,
DEFENDANT.

I

It is the understanding of the defense that in June, 1979 a Government agency stopped and searched the vessel "The Sea Otter", of which Michael Robert Quinn is the registered owner. Because the Government has not provided counsel with any investigative reports, is unclear whether the Government had any basis for the stop, boarding and search of that vehicle. As a result of the search residue of marijuana was found in a portion of the boat. Because of this certain persons who were on the boat were at one time charged with an offense but the charges were dismissed for lack of evidence. The defendant in this motion hereby moves to suppress all evidence seized and obtained as a result of the stop and search of "The Sea Otter" in 1979, because there was no adequate basis for the stop, and because there was not probable cause to justify this warrantless search of the vessel. The defendant also requests that the court accord an evidentiary hearing to determine adequately and accurately the facts surrounding the stop and boarding, and search of "The Sea Otter" in 1979.

II

In the *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979) the Court of Appeals for the Ninth Circuit concluded:

> ". . . . that the random stop and boarding of a vessel after dark for safety and registration inspection without cause to suspect noncompliance is not justified by the Government need to enforce compliance with safety regulations and constitutes a violation of the Fourth Amendment. A stop and boarding after dark must be for a cause, requiring at least a reasonable and articuable suspicion of noncompliance or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer." 608 F.2d 358 at 361.

Piner did nothing more than hold that the standard of articulable suspicion required for a stop under *Terry v. Ohio*, 392 U.S. 1 (1968) applies to vessels at sea. See also *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), *Reid v. Georgia*, 100 S.Court, 2752 (1980).

It is also clear that the search of a vessel, like the search of an automobile requires probable cause, as well as an excuse for noncompliance with the warrant requirement of the Fourth Amendment.

Because the Government has not made available to the defendent any investigative reports, the defense does not know the basis upon which the Government will claim the stop was made, nor does the defendant know whether the Government has an adequate basis to suggest that there was probable cause for the search and seizure that occurred in the instant case apparently at sea. *Prima facie* it

appears that the boarding and search of the vessel was illegal. The defendant respectfully requests that the court grant an evidentiary hearing in this matter, and order the suppression of the results of the search in this case.
Dated: 10 Oct 1983

Respectfully submitted,

EUGENE G. IREDALE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO: CR-83-0493-RHS

GOVERNMENT'S RESPONSE TO OMNIBUS MOTIONS OF MICHAEL ROBERT QUINN

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

MICHALE ROBERT QUINN,
DEFENDANT.

[Filed November 8, 1983]

XI. *MOTION TO SUPPRESS EVIDENCE*

A. *The Facts.*

In 1978, the Defendant Quinn approached George Mayberry Hunt in Costa Rica and asked him if he would locate a source of marijuana in Colombia and captain a vessel with a load of marijuana from the west coast of Colombia to Humboldt County, California where Quinn owned a large ranch near the ocean. The plan called for Hunt to take the vessel to be supplied by Quinn, pick up the load of marijuana, bring it to Humboldt County and return to Mexico with the vessel and the crew members. Quinn thereafter purchased the SEA OTTER in San Diego, California.

In the Spring of 1979, Quinn turned the SEA OTTER over to three South Americans who had been recruited by Hunt and they took vessel to Salina Cruz, Mexico where Hunt came on board. The SEA OTTER took on a load of marijuana at a point 270 miles off the west coast of Colombia, South America and proceeded north until it was off the coast of Humboldt County where Hunt contacted Quinn by means of V.H.F. radio. The marijuana was offloaded at Spanish Flat which is in the vicinity of Quinn's ranch by means of a helicopter and inflatable rafts. On the return trip south the SEA OTTER was forced to take refuge in Drake's Bay because of bad weather.

During the evening hours of June 27, 1979, California Fish and Game officers boarded the SEA OTTER which was at anchor because they suspected it was being used for illegal abalone fishing. They were not able to inspect the vessel because of approaching darkness and returned the next morning. They observed marijuana debris and items purchased in Mexico that led them to believe that the SEA OTTER was involved in marijuana smuggling. The state officers departed the vessel and notified the United States Coast Guard by telephone of their suspicions and were asked to follow the SEA OTTER until the Coast Guard and Customs Service personnel arrived on the scene.

Customs Patrol officers on board the United States Coast Guard Cutter POINT CHICO intercepted the SEA OTTER which was proceeding south toward the Farallon Islands at 37° 43′ N/122°, 45′ W, approximately twelve miles offshore and four miles south by south west of the large navigation bouy marking the approach to San Francisco. Two Customs Patrol officers and a coast guard petty officer boarded the SEA OTTER at approximately 10:10 a.m., pursuant to 19 U.S.C. § 1581(a). When the senior customs officer asked for the vessel's documentation, he was told the vessel's papers had fallen into the water on the floor of the forward berthing compartment.

A search of that area failed to reveals the ship's papers. When it was pointed out that one of the two Costa Ricans on board had an expired visa, Hunt admitted he was aware of that fact and that no attempt had been made to contact the United States Customs Service or the Immigration and Naturalization Service upon the vessel's arrival at Drake's Bay. Although all three persons claimed not to have been ashore, the officers observed two fifteen foot zodiac rafts on the deck of the vessel which appeared to have small particles of vegetable matter on them. In searching for documentation for the vessel, the senior officer found a receipt for repair work performed in Salina Cruz, Mexico and learned that such repair work had not been reported to United States Customs.

Based upon all of the foregoing, the SEA OTTER was placed under constructive seizure and taken to the United States Coast Guard Station at Yerba Buena Island. There the forward holds were pumped out and suspected marijuana was found and this material was later submitted to the United States Customs' laboratory for analysis.

Hunt and the two crew members were placed under arrest but were released when no formal charges were brought against them. Hunt stayed in the San Francisco Bay Area for the next nine months while the SEA OTTER underwent repairs. He then took the vessel to Costa Rica and used it for commercial fishing. The SEA OTTER was turned over to Michael Quinn in Punta Arenas, Costa Rica in November, 1981.

B. *Quinn Has No Standing To Contest The Search.*

The Defendant Quinn has no standing to contest the search of the SEA OTTER. The suppression of a Fourth Amendment violation may be urged only by one whose rights were violated by search, not by one aggrieved by introduction of damaging evidence gathered as a consequence of violation of the rights of another. *Alderman v. United States, supra* 394 U.S. 175.

The proper test to be applied in determining whether Quinn's rights were violated by the search of the SEA OTTER and the seizure of the marijuana is whether, by that act, Quinn suffered an invasion of a legitimate expectation of privacy. *Rakas v. Illinois,* 439 U.S. 128, 148-49 (1978); *United States v. Portillo,* 633 F.2d 1313, 1316 (9th Cir. 1980), *cert. denied,* 450 U.S. 1043 (1981). The burden rests on Quinn, as proponent of the motion to suppress, to establish that his Fourth Amendment rights were violated by the seizure of the marijuana. *Rawlings v. Kentucky,* 448 U.S. 98, 104 (1980); *Rakas v. Illinois,* 439 U.S. at 131 n.[2]

Quinn here can assert only ownership as a basis for a legitimate expectation of privacy in the SEA OTTER. Although "property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated," *United States v. Salvucci,* 448 U.S. 83, 91 (1980); *United States v. Perez,* 689 F.2d 1336, 1338 (9th Cir. 1982) (per curiam), the Supreme Court has made clearer still that ownership alone is not determinative. See *Rawlings v. Kentucky,* 448 U.S. 98, 105 (1980); *Mancusi v. DeForte,* 389 U.S. 347, (1967). The Court in *Rakas* recognized that expectations of privacy may be legitimized "by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society," each having varying strength depending upon the circumstances of each case. *Rakas v. Illinois, supra* 439 U.S. at 144 n.12. For example the right to exclude others may give rise to a legitimate expectation of privacy and may or may not stem from property interest. *United States v. Perez, supra* 689 F.2d at 1338.

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[2] Since Quinn as failed to meet has burden of going forward by appropriate declarations, the government has not filed any declarations except as to standing but would do so if requested by the Court.

Based on these principles, the Ninth Circuit recently decided in a case of first impression that the owner of a vehicle could not contest the legality of the seizure of cocaine while the vehicle was in the possession of a third party since the owner relinquished her expectation of privacy when she lent her automobile, *United States v. One 1977 Mercedes Benz,* 708 F.2d 444 (9th Cir. 1983).

Similary, in *United States v. Dyar,* 574 F.2d 1385, 1390 (5th Cir.), *cert. denied,* 439 U.S. 982 (1978), the Fifth Circuit held that defendants who asserted a leasehold interest in an airplane sufficient to create a traditional property right abandoned any expectation of privacy when they gave possession of the plane to a pilot.

Here Quinn turned the SEA OTTER over to persons unknown to him to take it to South America for a smuggling venture in early 1979 and thereafter allowed Hunt to continue to exercise dominion and control over the vessel until November, 1981. In these circumstances, Quinn can hardly claim any expectation of privacy in the SEA OTTER.

C. The Search and Seizure of The SEA OTTER was Justified Under Title 19 U.S.C. § 1581(a) and As a Border Search.

Should the Court decide Quinn has standing to contest the search, the discovery of the marijuana was justified as a Customs search under 19 U.S. C. § 1581(a) or as a border search.

The initial boardings of the SEA OTTER by California Fish and Game officers was part of a regulatory inspection scheme authorized under California Fish and Game Code §§ 1006, 2012 and 7702.[3] The Courts have long recognized administrative inspections in closed regulated enterprises

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[3] Section 1006. *Inspection.* The department may inspect the following:

(a) All boats, markets, stores and other buildings, except dwellings, and all receptacles, except the clothing actually worn by a person at

such as commercial fishing as an exception to the warrant requirement of the Fourth Amendment. *United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir. 1980) and *United States v. Tsuda Maru*, 470 F.Supp. 1223, 1228 (D. Alaska 1979).

The Supreme Court has held that the Fourth amendment requires a warrant for administrative searches of private property except in "certain carefully defined clauses of cases." *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). One of the recognized exceptions to the warrant requirement is for administrative searches of enterprises that traditionally have been closely regulated. *See United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). "Commercial fishing has a long history of being a closely regulated industry" *United States v. Raub, supra* at 1209.

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the time of inspection, where birds, mammals, fish, reptiles or amphibia may be stored, placed, or held for sale or storage.

(b) All boxes and packages containing birds, mammals, fish, reptiles or amphibia which are held for transporation by a common carrier. (Amended by Stats. 1972, c. 974, p. 1766, § 4.)

Section 2012. *Exhibition to officer of thing demanded.* All licenses, license tags, and the birds, mammals, fish, reptiles, or amphibia taken or otherwise dealt with under the provisions of this code, and any device apparatus designed to be, and capable of being, used to take birds, mammals, reptiles, or amphibia shall be exhibited upon demand to any person authorized by the department to enforce the provisions of this code or any law relating to protection and conservation of birds, mammals, fish, reptiles or amphibia. (Amended by Stats. 1974, c. 605, p. 1446, § 3.)

Section 7702. *Investigation of fish processing.* The department may enter and examine any canning, packing, preserving, or reduction plant, or place of business where fish or other fishery products are packed, preserved, manufactured, bought or sold, or board any fishing boat, barge, lighter, tender, or vehicle or receptacle containing fish, and ascertain the amount of fish received, or kind and amount of fishery products packed or manufactured and the number and size of containers or cans for fishery products purchased, received, used, or on hand and may examine books and records containing any account of fish caught, bought, canned, packed, stored or sold. (Stats. 1957, c. 456, p. 1424, § 7702)

In *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978), the Supreme Court clarified the administrative search exception. The distinguishing element giving rise to the exception in pervasively regulated *Biswell* businesses or traditionally regulated *Colonnade* industries, said the Court, is the awareness and expectation by a person entering such a business that he is subjecting himself to government's supervision and regulation. Under these conditions, no reasonable expectation of privacy can exist for the proprietor of the enterprise. The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973).

The authority of the Customs Service to stop the SEA OTTER is quite clear. Title 19 U.S. C. § 1581(a) which provides that: "[a]ny officer of the customs may at any time go on board of any vessel . . . at any place in the United States . . . and examine the manifest and other documents and papers . . . and to this end may hail and stop such vessel . . . and use all necessary force to compel compliance."

This statutory authority was recently upheld in *United States v. Villamonte-Marquez* ___U.S.___ 103 S.Ct. 2573 (1983). The fact that the fish and game wardens had provided information concerning the suspicious circumstances that they had observed does not change the result. *Villamonte-Marquez, supra* at 2477 n.3. "We would see little logic in sanctioning such examinations of ordinary unsuspect vessels but forbidding them in the case of suspected smugglers." *United States v. Arra*, 630 F.2d 836, 846 (1st Cir. 1980).

Alternatively the search can be justified as a border search. Probable cause is not required for a search made at or near an international boundary in connection with the enforcement or customs laws. *Klien v. United States*, 472 F.2d 847, 849 (9th Cir. 1973). It should be noted that the

Controlled Substances Act criminalizes exportation of contraband, as well as importation. 21 U.S.C. § 953. It is equally unlawful to possess contraband on board vessel "arriving or departing from the United States or *the customs territory* of the United States." (emphasis added). 21 U.S.C. § 955.

In *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), the Supreme Court held that the great latitude allowed for searches at the border also extends to the border's functional equivalents.

In *Alexander v. United States,* 362 F.2d 379 (9th Cir.), *cert. denied,* 385 U.S. 977 (1966), the Ninth Circuit set out the criteria for a customs search at the functional equivalent of the border. In *Alexander,* the Court declared that:

> Where . . . a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed, as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle [or vessel] at the time of search was aboard the vehicle [or vessel] at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a 'border search.'

Id. at 382.

In *United States v. Solmes,* 527 F.2d 370 (9th Cir. 1975), it was held that a search without probable cause pursuant to 19 U.S.C. § 1581(a) of a vessel in a harbor may be valid under the Fourth Amendment as a border search at the functional equivalent of the border, where there is

evidence to support a finding that the boat actually came from international or foreign waters. *In United States v. Tilton,* 534 F.2d 1363 (9th Cir. 1976), *Solmes* was expanded to cover situations where there are articulable facts to support a reasonably certain conclusion by the Customs officers that a vessel has crossed the border and entered our territorial waters. This latter rule looks not to whether the vessel actually crossed into the United States territory, but whether the searching customs officers were reasonably certain that it did. The crossing of the three mile limit of United States territorial waters can also be a functional border crossing. *United States v. Stanley,* 545 F.2d 661 (9th Cir. 1976).

Of course, neither actual observation of the vessel crossing the border, nor continuous surveillance of the vessel, is a necessary requisite for a constitutional border search as long as other factors indicate that the contraband was taken across an international border and the "nexus" with the border remains unbroken. *See e.g., United States v. Solmes, supra; Leeks v. United States,* 356 F.2d 471 (9th Cir. 1966); *United States v. Ingham,* 502 F.2d 1287 (5th Cir. 1974). However, in the present case the boat was under surveillance at the actual crossing of the border and this meets the second requirement of the *Alexander* criteria.

Based on the facts of this case, the SEA OTTER was at the functional equivalent of the border at Drake's Bay. The absence of an actual observation of a boundary crossing does not preclude a subsequent search from qualifying as a "border" search. *United States v. Ingham, supra* 502 F.2d 1287. Because of the illegal alien on board and the fact the vessel had recently been repaired in Mexico, it was legitimate for the officers to conclude that the SEA OTTER had been in foreign waters. Thus, as the search was a border search, the officers did not need probable casue, the fact of its being a border search suffices. *United*

States v. Barclift, 514 F.2d 1073 (9th Cir. 1975); *Klien v. United States, supra; Witt v. United States*, 287 F.2d 389 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961). The "mere suspicion" that the SEA OTTER had been used to unlawfully import (21 U.S.C. § 952), export (21 U.S.C. § 953[c]), or possess (21 U.S.C. § 955) marijuana was all that was required in this case.

In the alternative, the seizure of the SEA OTTER can be justified as an outgoing border search. The facts here are very analogous to those in *United States v. Stanley, supra* where the Ninth Circuit recognized the validity of the seizure of a United States fishing vessel leaving the territorial waters of the United States (three mile limit). In *Stanley*, a Sonoma County Deputy Sheriff discovered marijuana debris near a U-Haul rental truck stuck on a pier at Bodega Bay. He concluded that a fishing vessel foreign to Bodega Bay seen leaving the harbor had unloaded marijuana. He notified the Coast Guard and requested the apprehension of the vessel. The fishing boat O/S NATIONAL was first seen about nine miles from the coast and boarded 40 minutes later by Customs Patrol and Coast Guard personnel. There the Ninth Circuit concluded that the search and seizure of the NATIONAL was valid as a functional border search when the vessel had crossed from territorial waters of the United States and there is sufficient evidence to convince a fact finder, to a reasonable certainty, that any contraband which might be found at the time of the search was also aboard at the border crossing.

DATED: November 8, 1983

Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

By: _____
DENNIS MICHAEL NERNEY
Assistant United States Attorney

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No: CR-83-0493-RHS
UNITED STATES OF AMERICA,
PLAINTIFF,

v.

MICHAEL ROBERT QUINN,
DEFENDANT.

[Filed *November 10, 1983*]

DECLARATION OF WESLEY DYCKMAN IN OPPOSITION OF DEFENDANT'S OMNIBUS MOTIONS

I, WESLEY DYCKMAN, depose and state:

1. In 1975, George Mayberry Hunt moved to Costa Rica and made that his primary place of residence until 1983. My source of information is George Mayberry Hunt and a review of Costa Rican immigration documents.

2. In February, 1976, George Mayberry Hunt took part in the importation of approximately 16,000 pounds of marijuana into the United States at Bodega Bay, California. He was indicted in the Northern District of California for his participation in that event in February, 1981, and that the indictment was superseded in February, 1982. My source of information is George Mayberry Hunt and a review of Northern District of California Criminal Case Number 81-0030-RPA.

3. In 1978, the Defendant Quinn approached George Mayberry Hunt in Costa Rica and asked him if he would locate a source of marijuana in Colombia and captain a

vessel with a load of marijuana from the west coast of Colombia to Humboldt County, California where Quinn owned a large ranch near the ocean. The plan called for Hunt to recruit a crew for the vessel which Quinn would purchase, pick up a load of marijuana on the west coast of Colombia and bring it to Humboldt County and return to Mexico with the vessel and the crew members. Quinn thereafter purchased the SEA OTTER in San Diego, California. My source of information is George Mayberry Hunt and a review of United States Coast Guard documentation for the SEA OTTER.

4. In May, 1979, Hunt and two Costa Rican crew members picked up an approximate twelve ton load of marijuana off the west coast of Colombia and proceeded north until the SEA OTTER was off the coast of Humboldt County where Hunt contacted Quinn by means of V.H.F. radio. The marijuana was offloaded at Spanish Flat which is in the vicinity of Quinn's ranch by means of helicopter during the day light hours and the job was completed after dark by means of inflatable rafts called Zodiacs. On the return trip south, the SEA OTTER was forced to take refuge in Drake's Bay because of bad weather. My source of information is George Mayberry Hunt.

5. California Fish and Game officers boarded the SEA OTTER because of suspected fishing violations at Drake's Bay on the evening of June 27, 1979. The observations of these officers were reported to the United States Coast Guard and Customs Service who intercepted the vessel approximately twelve miles off the coast as it travelled south toward the Farallon Islands. The SEA OTTER was placed under constructive seizure and taken to Yerba Buena Island where a more thorough search was performed on the vessel. The forward holds were pumped out and suspected marijuana was found and this material was later submitted to the United States Customs laboratory for

analysis. Hunt and the two South American crew members were placed under arrest but were released when no formal charges were brought against them. My source of information is George Mayberry Hunt and Customs Patrol Officer George Bruns.

6. Hunt stayed in the San Francisco Bay Area for the next nine months while the SEA OTTER underwent repairs. He then took the vessel to Costa Rica and used it for commercial fishing. The SEA OTTER was turned over to Michael Quinn in Punta Arenas, Costa Rica in November, 1981. My source of information is George Mayberry Hunt.

7. The marijuana debris which was recovered from the F/V SEA OTTER on June 28, 1979 at Yerba Buena Island was submitted to United States Customs chemist David Chia on June 28, 1979. Mr. Chia tested the samples submitted and responded that marijuana was present. The samples were returned from the customs laboratory on June 19, 1979 to Custom Patrol Officer Art Cruz who submitted them to the customs seizure custodian on that date. The evidence was destroyed on March 25, 1980 according to United States Customs' internal procedures after it was determined that it was not needed for trial. My source of information is Supervisory Customs Patrol Officer Ed Callahan and a review of the relevant customs forms and records.

8. In the Spring of 1982, Costa Rica rendered over Musa Shihadeh to the United States authorities on a New Jersey murder charge. Prior to that time Costa Rica had never extradited anyone to the United States and was a notorious haven for fugitives from the United States. In July, 1982, United States officials went to Costa Rica to negotiate an Extradition Treaty with that government. My source of information is Rex Young, Senior Attorney-Advisor, Officer of International Affairs, United States Department of Justice, Washington, D.C.

9. In August, 1982, agents of the Drug Enforcement Administration located George Mayberry Hunt in Costa Rica. My source of information is William Hansen of the Drug Enforcement Administration who was then stationed in Costa Rica.

10. In August, 1982, the United States Attorney's Office for the Northern District of California submitted papers for the extradition of George Mayberry Hunt to the Office of International Affairs for review and translation into Spanish. Those papers were hand delivered to Costa Rican authorities in October, 1982 and George Mayberry Hunt was provisionally arrested on November 9, 1982 in connection with Northern District of California Criminal Case Number 81-0030-RPA. After the exhaustion of his judicial remedies in Costa Rica, George Mayberry Hunt was brought to the Northern District of California where he was arraigned on May 12, 1983. My source of information is Rex Young and a review of Northern District of California Criminal Case Number 81-0030-RPA.

11. In June, 1983, George Mayberry Hunt entered into an agreement with the United States Attorney whereby he plea-bargained the charges against him and agreed to testify before the Grand Jury.

12. On August 4, 1983, George Mayberry Hunt testified before Federal Grand Jury 83-2 which returned a true bill against Michael Robert Quinn on the same day. Quinn was arrested in San Diego, California on August 8, 1983 and ordered removed to the Northern District of California. My source of information is my participation in the case and a review of the Northern District of California Criminal Number 83-0493-RHS.

13. George Mayberry Hunt was and is represented by Attorney John Milano of San Francisco in Criminal Case Number 81-0030-RPA. Mr. Milano advises me that he was contacted by Quinn's attorney, Eugene Iredale in September, 1983 and he declined to furnish Mr. Iredale

with Hunt's current address or produce him for interview. Mr. Milano has not since been contacted by anyone representing Mr. Quinn. My source of information is Mr. Milano.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of November, 1983 at San Francisco, California.

WESLEY DYCKMAN, Special Agent
Drug Enforcement Administration

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing DECLARATION OF WESLEY DYCKMAN IN OPPOSITION OF DEFENDANT'S OMNIBUS MOTIONS has been mailed this date to the following:

Gene Iredale, Esq.
Attorney at Law
625 Broadway, Suite 1021
San Diego, California 92101

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of November, 1983 at San Francisco, California.

ADDIE L. BANKS, Secretary
United States Attorney's Office

DEFENDANT: MICHAEL QUINN

NORTHERN DISTRICT OF CALIFORNIA

DOCKET NO.: CR 83-493 RHS

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO-245 (8/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: JANUARY DAY: 20, YEAR: 1984

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL EUGENE IREDALE 625 BROADWAY # 1135, SAN DIEGO 92101
(Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of VIOLATION: TITLE 21, U.S.C. SECTION 963 -- CONSPIRACY TO IMPORT MARIJUANA.

53pb

COURTRAN

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE YEARS AND FINED $15,000.00.

ENTERED IN CRIMINAL DOCKET 1/26, 19 84

SPECIAL CONDITIONS OF PROBATION

REMAINING COUNTS ARE DISMISSED.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

ROBERT H. SCHNACKE

Date JAN. 20, 1984

29

44

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-6070 RHS

UNITED STATES OF AMERICA
PLAINTIFF,

v.

THE QUINN RANCH CONSISTING OF APPROXIMATELY 220 ACRES IN HUMBOLDT COUNTY, CALIFORNIA, LOCATED AND DESCRIBED AS THAT PART OF SECTION 12, IN TOWNSHIP 3 SOUTH, RANGE 2 WEST, HUMBOLDT COUNTY, PARCEL NUMBER 104-052-16; RECORDED IN THE HUMBOLDT COUNTY RECORDER'S OFFICE IN BOOK 1428, PAGE 031, AND THAT PART OF SECTION 12, IN TOWNSHIP 3 SOUTH, RANGE 2 WEST, HUMOLDT COUNTY PARCEL NUMBER 104-052-17, RECORDED IN THE HUMBOLDT RECORDER'S OFFICE IN BOOK 1428, PAGE 031; AND ALL IMPROVEMENTS THEREON CONSISTING OF A SINGLE FAMILY RANCH STYLE RESIDENCE, A BARN, SEVERAL OUT-BUILDINGS, A WOOD FRAME GREENHOUSE, SHEDS, SEVERAL WHITE COLORED SPHERICAL WATER STORAGE TANKS, A WHITE COLORED WIND POWERED GENERATOR, AND VEHICLES,

DEFENDANT.

MICHAEL ROBERT QUINN
CLAIMANT

[Filed *January 20, 1984*]

CONSENT JUDGMENT OF FORFEITURE

On December 19, 1983 a Complaint for Forfeiture against the above-described real property was filed in this Court on behalf of the United States of America by the

United States Attorney for this district. The Complaint alleges that the defendant real property was acquired and improved with assets traceable to the unlawful exchange of controlled substances, and that the property was unlawfully used to contain and secrete controlled substances, all in violation of Title 21, U.S.C. § 881. The owner of record, Michael Robert Quinn aka Michael R. Quinn, intervened and filed a claim to the real property on December 29, 1983. Pursuant to a Warrant of Arrest issued by this Court, the United States Marshal for this district seized the said real property on January 7, 1984. The Claimant Quinn now consents that a Judgment, as prayed for in the Complaint, be entered condemning 200 of the approximate 220 acres under seizure.

The Court being fully advised in the premises, and on motion of the parties hereto:

IT IS ORDERED AND ADJUDGED, AND DECREED that judgment be entered against the following described defendant real property situated in the County of Humboldt, State of California and that said real property hereby is condemned and forfeited to the United States of America:

/

/

PARCEL ONE: THE Southeast Quarter of the Northwest Quarter, the East Half of the Southwest Quarter and the West Half of the Southeast Quarter of Section 12, Township 3 South, Range 2 West, Humboldt Meridian.

PARCAL TWO: All that portion of the Southwest Quarter of the Northwest Quarter and the Southwest Quarter of the Southwest Quarter of Section 12, Township 3 South, Range 2 West, Humboldt Meridian, lying Easterly of the center line of the existing road.

PARCEL THREE: The Northwest Quarter of the Southwest Quarter of Section 12, Township 3 South, Range 2 West, Humboldt Meridian, lying Easterly of the existing road.

PARCEL FOUR: A non-exclusive easement for ingress and egress over the existing road known as "Cooskie Ridge Road", which road commences at the County Road in Section 24, Township 2 South, Range 2 West, Humboldt Meridian, and extends in a Southerly direction through said Section 24, and through Sections 25, 26, 35 and 36, Township 2 South, Range 2 West, Humboldt Meridian, and through Sections 1, 2, 11 and 12, Township 3 South, Range 2 West, Humboldt Meridian.

Excepting to Michael Robert Quinn aka Michael R. Quinn that parcel of land situated in the County of Humboldt, State of California generally described as follows:

All that portion of the Northwest quarter of the Southwest quarter of Section 12, Township 3 South, Range 2 West, Humboldt Meridian, lying easterly of the existing road known as "Cooskie Ridge Road" and the West half of the West half of the Northeast quarter of the Southwest quarter; and the Southwest quarter of the Southwest quarter of the Southeast quarter of the Northwest quarter; and the Southeast quarter of the Southeast quarter of the Southwest quarter of the Northwest quarter of Section 12, Township 3 South Range 2 West, Humboldt Meridian, containing 20 acres more or less. There is reserved to Michael Robert Quinn aka Michael R. Quinn a non-exclusive easement for ingress and egress to the above excepted land over the existing road known as "Cooskie Ridge Road", which road commences at the County Road in Section 24, Township 2 South, Range 2 West, Humboldt Meridian, and extends in a Southerly direction through said Section 24, and through Sections 25, 26, 35 and 36, Township 2 South, Range 2 West, Humboldt Meridian, and through Sections 1, 2, 11 and 12, Township 3 South, Range 2 West, Humboldt Meridian.

IT IS FURTHER ORDERED THAT the Claimant Michael Robert Quinn execute all conveyances or other legal documents necessary to perfect title in the defendant real property in the United States of America.

IT IS FURTHER ORDERED THAT each party shall bear its own cost.

Dated at San Francisco, California, this 20th day of January, 1984.

ROBERT H. SCHNACKE
United States District Judge

We hereby expressly consent to entry of the foregoing Consent Judgment of Forfeiture against the defendant real property in favor of the Plaintiff, United States of America and against Michael Robert Quinn, Claimant in this action.

JOSEPH P. RUSSONIELLO
United States Attorney

Dated: January 20, 1984

DENNIS MICHAEL NERNEY
Assistant United States Attorney

Attorneys for Plaintiff

Dated: January 20, 1984

MICHAEL ROBERT QUINN

Dated: January 20, 1984

EUGENE G. IREDALE
Attorney for claimant
MICHAEL ROBERT QUINN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-84-0189-RHS

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

ONE FISHING VESSEL NAMED "SEA OTTER" OFFICIAL NUMBER 580508,
DEFENDANT.

MICHAEL ROBERT QUINN,
CLAIMANT.

Filed January 20, 1984

CONSENT JUDGMENT OF FORFEITURE

On August 9, 1983, a Complaint for Forfeiture against the above-described vessel was filed in the United States District Court for the Southern District of California on behalf of the United States of America by the United States Attorney and an Assistant United States Attorney for that district. The Complaint alleges that the vessel was unlawfully used for the importation of marijuana into the United States in violation of Title 19, United States Code, Section 1595a(a), Title 21, United States Code, Section 881 and Title 49, United States Code, Section 781. Pursuant to a Warrant of Arrest issued by that Court, the

United States Marshal for that district seized the said vessel on August 9, 1983. Notice of such seizure was thereafter duly published in the *San Diego Daily Transcript,* a newspaper of general circulation in the Southern District of California. Michael Robert Quinn subsequently intervened and filed a Claim to the defendant vessel and filed an answer to the complaint for forfeiture on September 1, 1983. His sole interest in the defendant vessel has been verified by the Coast Guard, and no liens or other encumbrances exist. On Stipulation of the parties, the case was ordered transferred to the Northern District of California pursuant to Title 28, United States Code, Section 1404 on January 6, 1984. The Claimant Quinn now consents that a Judgment, as prayed for in the Complaint, be entered condemning the vessel under seizure.

The Court being fully advised in the premises, and on the motion of the parties hereto:

IT IS ORDERED AND ADJUDGED, AND DECREED that judgment be entered against the defendant vessel and that said vessel be and hereby is condemned and forfeited to the United States of America;

IT IS FURTHER ORDERED that each party shall bear it own costs.

/ / /

/ / /

Dated at San Francisco, California, this 20th day of January, 1984.

ROBERT H. SCHNACKE
United States District Judge

We hereby expressly consent to entry of the foregoing Consent Judgment of Forfeiture against the defendant vessel in favor of the Plaintiff, United States of America and against Michael Robert Quinn, Claimant in this action.

JOSEPH P. RUSSONIELLO
United States Attorney

Dated: January 20, 1984

DENNIS MICHAEL NERNEY
Assistant United States Attorney

Attorneys for Plaintiff

Dated: January 20, 1984

MICHAEL ROBERT QUINN
Claimant

Dated: January 20, 1984

EUGENE G. IREDALE
Attorney for claimant
MICHAEL ROBERT QUINN

In the Supreme Court of the United States

NO. 84-1717

UNITED STATES, PETITIONER

v.

MICHAEL ROBERT QUINN

ORDER ALLOWING CERTIORARI.

Filed October 15, 1985.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

No. 84-1717

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
ANDREW L. FREY
Deputy Solicitor General
MARK I. LEVY
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a defendant has a Fourth Amendment expectation of privacy that entitles him to challenge the search of a boat, which he had never personally used prior to the search and which had been out of his custody and control for two months at the time of the search, on the grounds that he was the owner of the boat and was a co-venturer in a criminal enterprise involving the use of the boat by others to smuggle marijuana in which he had a possessory interest.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1717

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 751 F.2d 980.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1984. A petition for rehearing was denied on February 1, 1985 (Pet. App. 6a). On March 26, 1985, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 2, 1985. The petition was filed on that date and was granted on October 15, 1985 (J.A. 52). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

In a four-count indictment returned in August 1983 in the United States District Court for the Northern District of California, respondent was charged with importing 12,000 pounds of marijuana into the United States on June 23, 1979, in violation of 21 U.S.C. 952(a); possessing with intent to distribute 12,000 pounds of marijuana on that date, in violation of 21 U.S.C. 841(a)(1); conspiring to import marijuana, in violation of 21 U.S.C. 963; and conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846. Following the district court's denial of his suppression motion for lack of "standing," respondent entered a conditional plea of guilty on the importation conspiracy count pursuant to Fed. R. Crim. P. 11(a)(2); the plea was conditioned on the outcome of respondent's appeal of the "standing" ruling. See J.A. 21-24. Respondent was sentenced to three years' imprisonment, fined $15,000, and ordered to forfeit a ranch and boat that were involved in the drug smuggling enterprise (J.A. 44-51). The court of appeals reversed the district court's decision on the issue of "standing" and remanded for disposition of respondent's suppression motion on the merits.

1. The relevant facts are set forth in the government's brief and supporting affidavit in opposition to respondent's motion to suppress (J.A. 29-31, 39-41). Respondent did not contest the government's submission or present any additional evidence.

This uncontroverted record shows that in 1978 respondent solicited co-conspirator George Hunt to participate in a scheme to import marijuana by boat from Colombia to respondent's ranch on the coast of Northern California.[1]

[1] Following his eventual extradition from Colombia in August 1983, Hunt pleaded guilty pursuant to a plea agreement and testified before the grand jury that returned the instant indictment against respondent (J.A. 42).

The scheme contemplated that respondent would purchase a boat for transporting the marijuana and that Hunt would obtain a crew, pick up the marijuana in Colombia and deliver it to California, and then go to Mexico with the boat and crew. Pursuant to that plan, respondent purchased a fishing boat, the *Sea Otter*, in San Diego. J.A. 29, 39-40. Respondent has not contended that he personally used the *Sea Otter* at that time or maintained living quarters or storage space on it.

In the spring of 1979, respondent turned over the *Sea Otter* to three men who had been recruited by Hunt, and they sailed to Mexico to meet Hunt. In May 1979, the *Sea Otter* picked up 12 tons of marijuana in Colombia. It then traveled back to California, where the crew contacted respondent and delivered a six-ton shipment of marijuana to his ranch in June.[2] Respondent did not accompany the others on any part of this trip, and at no time during this approximately two-month period was he aboard the *Sea Otter*. J.A. 30, 40; Pet. App. 9a.

Thereafter, on the evening of June 27, 1979, California Fish and Game officials boarded the *Sea Otter* because they suspected that it had been engaged in unlawful fishing operations. However, an inspection could not be conducted due to darkness, and the officers returned the next morning. At that time they observed in plain view marijuana debris and items that had been purchased in Mexico. The state officers then left and notified the United States Coast Guard and the Customs Service of their suspicions that the *Sea Otter* had been involved in smuggling marijuana. J.A. 30, 40.

[2] Six tons of the original 12-ton cargo were destroyed by a fire on the *Sea Otter* during its voyage.

A short time later, federal officials intercepted the *Sea Otter* and went aboard. The crew was unable to produce the documentation for the boat, and one of the crew members was discovered to have an expired visa. Hunt then admitted that he had not contacted either the Coast Guard or the Immigration and Naturalization Service when the vessel arrived at the California coast. Moreover, the officials came across a receipt for repair work done in Mexico, and Hunt conceded that these repairs had not been reported to Customs. Finally, although the crew members denied that they had been ashore in California, the federal officers saw two large rafts on board that appeared to have been recently used. J.A. 30-31, 40.

The *Sea Otter* was placed under constructive seizure and taken to a Coast Guard station. There, water in its forward holds was pumped out, and marijuana residue was found. Hunt and the other crew members were arrested, but they were later released when no formal charges were brought. J.A. 31, 40-41.

Hunt remained in the San Francisco area for nine months while the *Sea Otter* underwent repairs. He then took the boat to Costa Rica and used it for commercial fishing. In November 1981, the *Sea Otter* was turned over to respondent in Costa Rica. J.A. 31, 41. Respondent has made no claim that he personally used or was even ever aboard the *Sea Otter* during the two and one-half years between the spring of 1979 and November 1981.

2. In the district court, respondent filed a motion to suppress evidence on the ground that the stop and the search of the *Sea Otter* were unlawful. Respondent based his right to seek suppression on the fact that he was the owner of the *Sea Otter* (J.A. 26, 32; Pet. App. 8a). The district court denied the motion, finding that respondent had no expectation of privacy and thus lacked "standing" under the Fourth Amendment because he was not present at the time of the search and had turned over the vessel to the control and operation of others (*id.* at 9a).

3. On respondent's appeal pursuant to his conditional guilty plea, a divided panel of the court of appeals reversed (Pet. App. 1a-4a). The majority concluded that respondent had a legitimate expectation of privacy in the *Sea Otter*, which entitled him to challenge the validity of the search, "based on the conjunction" (*id.* at 2a) of the following factors: (1) "[h]is ownership of the boat" (*ibid.*); (2) "[h]is possessory interest in the marijuana seized, arising from his joint venture with Hunt for the smuggling of marijuana" (*ibid.*); (3) "[t]he fact that the boat, when searched, was returning from a delivery of marijuana to [respondent] and was, thus, pursuing the purpose of [his] joint venture" (*ibid.*); and (4) "[t]he fact that to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy" (*id.* at 3a). Accordingly, the court of appeals remanded the case to the district court for consideration of the merits of respondent's motion to suppress (*ibid.*).

Judge Sneed dissented (Pet. App. 4a). He stated that a defendant's expectation of privacy would be reasonable and legitimate under the Fourth Amendment only if it "corresponds to that which would have been entertained by a reasonable, but innocent and law abiding, person having the same relationship as did the [defendant] to the area and objects searched" (*ibid.*). Applying that standard, Judge Sneed concluded that respondent had no Fourth Amendment privacy interest in the *Sea Otter* because "[m]ere ownership of the boat and a joint venture to transport non-contraband (lumber, for example) would not lead a reasonable co-owner, who was neither a member of the crew nor a passenger, to expect that any papers or valuables he placed in the hold of the boat would remain private" (*ibid.*).

SUMMARY OF ARGUMENT

In this case, the Ninth Circuit has held that under the Fourth Amendment a defendant has a legitimate expectation of privacy in a boat simply on the basis that he is the owner of record of the vessel and is a co-venturer in a criminal enterprise involving the use of the ship by others to smuggle drugs in which he has a possessory interest. Respondent was accordingly permitted to challenge the lawfulness of the stop, boarding, and search of the boat, and thus to seek the suppression of evidence seized during the search, even though it is undisputed that he never personally used the boat, that he purchased it for others to use in a drug smuggling scheme, that he had relinquished custody and control over the boat for a two-month period at the time of the search, and that he was not present on the boat during either the smuggling expedition or the search.

In effect, the court of appeals' decision creates a rule of "automatic standing" that allows a defendant who is the absentee owner of a conveyance to seek the suppression of evidence found thereon if, at the time of the stop or search, it was being used by his confederates in furtherance of their joint criminal venture. Whether viewed individually or together, the considerations relied on by the court below do not establish that *the defendant* had a Fourth Amendment expectation of privacy in the area searched or that the government's action implicated *his* personal right to be free from unreasonable searches and seizures.

A defendant's ownership of the situs that was searched does not, as such, entitle him to challenge the validity of the search. The Fourth Amendment guarantee against unreasonable searches protects privacy interests, not property rights, and the fact of ownership of the searched area does not suffice to create a legitimate expectation of privacy. While the owner may have a privacy interest because of his control over the property and the uses he

makes of it, it is those factors, rather than his bare title, that establishes Fourth Amendment "standing." Here, the record is clear that respondent, notwithstanding his title interest, made no use of the searched boat that would in fact give rise to a legitimate expectation of privacy.

In addition, a legitimate expectation of privacy does not arise from a defendant's status as a criminal co-venturer with a possessory interest in the seized drugs. That a defendant engages in collective criminal activity neither entitles him to assert vicariously the Fourth Amendment rights of his confederates nor creates a personal privacy right on his part that would not otherwise exist. A principal-agent relation, although relevant to substantive criminal liability, does not confer a privacy interest on the principal.

Likewise, a possessory interest in the objects seized does not establish a privacy interest in the area searched. The Ninth Circuit's contrary conclusion confuses the distinct concepts of a defendant's possessory interest that is infringed by a seizure and his privacy interest that is infringed by a search. As the Court held in *United States* v. *Salvucci*, 448 U.S. 83 (1980), and *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), possession of the seized items is not equivalent to a legitimate expectation of privacy in the searched area, and the fact of possession cannot serve as a surrogate for the requisite privacy claim. And at all events a defendant can have no legitimate possessory interest in contraband that, by definition, he has no legal right to possess.

Accordingly, since respondent never personally used the *Sea Otter* and had yielded custody and control of it to others for a substantial period of time when the boat was searched, he is not entitled to challenge the propriety of the search. The facts that he was the technical title holder of the *Sea Otter* and was involved in a joint criminal venture in which others used the ship to smuggle his drugs do not indicate that he had a legitimate expectation of privacy under the Fourth Amendment.

ARGUMENT

RESPONDENT DID NOT HAVE A LEGITIMATE EXPECTATION OF PRIVACY IN THE *SEA OTTER* AND THEREFORE CANNOT SEEK TO SUPPRESS EVIDENCE OBTAINED DURING A SEARCH OF THE VESSEL

The undisputed record in this case establishes that respondent never personally used the *Sea Otter* or maintained private quarters on it, that he purchased the boat for the purpose of having other people use it in connection with a drug smuggling venture, that he was not present on the *Sea Otter* during its South American voyage or at the time it was searched, and that the boat was out of his custody and control during both the two-month period preceding that search and the two years following the search. Nevertheless, the Ninth Circuit held that respondent had a legitimate expectation of privacy in the *Sea Otter*, and therefore could seek the suppression of evidence, because he was the owner of the boat and because he was a co-venturer in the drug operation with a possessory interest in the marijuana that was seized. On that basis, the court of appeals reversed the district court's determination that respondent did not have "standing" under the Fourth Amendment to challenge the search.

The Ninth Circuit's legal analysis is irreconcilable with settled Fourth Amendment principles. Respondent had no legitimate expectation of privacy in the *Sea Otter*, since he had never used it and had relinquished custody and control over it for a considerable period of time when the search occurred. By basing an asserted privacy interest on respondent's title to the vessel and his role in the drug enterprise, the court of appeals has invented a legal principle that automatically confers Fourth Amendment "standing" on the absentee owner of a conveyance to challenge any search of that conveyance that takes place during the course of a joint criminal venture.

Such a holding is fundamentally misconceived and would unjustifiably impede the prosecution and conviction of those guilty of crimes. It is frequently the situation that a defendant—and, as in this case, often the leader or "kingpin" of the illegal scheme—will purchase a conveyance for his confederates to use in a joint criminal enterprise. To permit that defendant to move to suppress evidence based on a challenge to the search, even though no privacy interest of his was implicated, is an unsupported and unsound rule that serves only to confer a Fourth Amendment windfall on defendants like respondent.

Preliminarily, we note that respondent's motion for suppression of evidence asserted a challenge to the initial stop and boarding of the *Sea Otter* as well as to the subsequent search of the ship. The stop, however, while temporarily interfering with the liberty of movement of persons aboard the vessel and therefore a seizure within the meaning of the Fourth Amendment (see *Terry* v. *Ohio*, 392 U.S. 1, 16, 19 n.16 (1968)), plainly invaded no right of respondent's, who was many miles away and whose freedom of movement was wholly unrestricted. It is virtually a truism to say that those who have not been seized may not contest the lawfulness of the seizure. See, *e.g. Alderman* v. *United States*, 394 U.S. 165, 172-173 (1969); *Wong Sun* v. *United States*, 371 U.S. 471, 491-492 (1963); see also 3 W. LaFave, *Search and Seizure* § 11.3, at 545, 571 (1978). Similarly, much like the "open fields" around a dwelling (see *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984)), the deck or other exposed area of the *Sea Otter* is not a place in which respondent as the owner could have a reasonable expectation of privacy, and therefore he cannot object to the boarding as a ground for suppressing evidence. Accordingly, even if respondent were found to have a privacy interest in the *Sea Otter* that entitles him to raise the question whether the search of the boat was itself

a violation of the Fourth Amendment, he cannot even colorably claim the right to attack the lawfulness of the initial stop and boarding of the vessel.

A. A Defendant Can Seek The Suppression Of Evidence Based On An Allegedly Invalid Search Only If He Establishes That The Challenged Search Implicated His Own Privacy Interest

The Fourth Amendment " 'protects people from unreasonable government intrusions into their legitimate expectations of privacy.' " *United States* v. *Place*, 462 U.S. 696, 706-707 (1983), quoting *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977). As the Court explained in *United States* v. *Knotts*, 460 U.S. 276, 280-281 (1983), quoting *Smith* v. *Maryland*, 442 U.S. 735, 740-741 (1979), and *Katz* v. *United States*, 389 U.S. 347 (1967):

> "Consistently with *Katz*, this Court uniformly has held that application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. [Citations omitted.] This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' 389 U.S., at 361 – whether, in the words of the *Katz* majority, the individual has shown that 'he seeks to preserve [something] as private.' *Id.*, at 351. The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable," ' *id.*, at 361 – whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances. *Id.*, at 353."

See also, *e.g.*, *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 7. Proper application of the Fourth Amendment requires a court to reconcile the "conflict • • • between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement." *United States* v. *Ross*, 456 U.S. 798, 804 (1982). Under this constitutional standard, courts cannot " 'merely recite the [defendant's] expectations and risks without examining the desirability of saddling them upon society.' " *Hudson* v. *Palmer*, slip op. 7 n.7, quoting *United States* v. *White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

In order to contest the legality of a search as a basis for seeking the suppression of evidence, a defendant must show that the search implicated a privacy interest of his that the Fourth Amendment protects. See *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978). Under settled principles, "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). Thus, it is "the established rule that a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights. And the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party." *United States* v. *Payner*, 447 U.S. 727, 731 (1980) (emphasis in original; citation omitted). For this reason, "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman*, 394 U.S. at 171-172. See also, *e.g.*, *United States* v. *Salvucci*, 448 U.S. 83, 86-87, 94 (1980); *Rakas*, 439 U.S. at 133-134 & n.3, 137, 138.

In addition, the defendant, as "[t]he proponent of a motion to suppress [,] has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search * * * ." *Rakas*, 439 U.S. at 131 n.1. Accordingly, to prevail, the defendant must show "not only that the search * * * was illegal, but also that he had a legitimate expectation of privacy in [the area or item that was searched]." *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980). And if the defendant's allegations regarding the requisite privacy interest are contested, the defendant is "put to [his] proof on * * * [the] issue" (*Rakas*, 439 U.S. at 131 n.1) and must " 'establish * * * that he himself was the victim of an invasion of privacy.' " *Alderman*, 394 U.S. at 173, quoting *Jones* v. *United States*, 362 U.S. 257, 261 (1960); see also *e.g.*, *United States* v. *Bachner*, 706 F. 2d 1121, 1125-1128 (11th Cir.), cert. denied, 464 U.S. 896 (1983).[3]

[3] Where the defendant does not raise grounds that adequately demonstrate a legitimate privacy interest, his motion to suppress should be denied. See *Rakas*, 439 U.S. at 131 n.1. Furthermore, denial of the suppression motion is appropriate in that circumstance even if the government's proof at trial will establish sufficient facts to demonstrate his "standing." See *United States* v. *Gomez*, 770 F.2d 251, 252-254 (1st Cir. 1985). While the government may not, of course, contest the defendant's assertion of "standing" at the suppression hearing on the basis of facts that it knows are inconsistent with its submission at trial, the defendant's failure to go forward with his burden of proof requires that his motion be denied; unless and until the defendant makes a prima facie showing, the government need not put on evidence to oppose suppression, and the defendant's motion must be rejected. Indeed, especially since a defendant will invariably know any circumstances that establish his privacy interest in the searched premises, his failure to present them is little different from the failure to file a suppression motion at all. Notwithstanding these principles, some courts have incorrectly looked to the government's case at trial to determine whether the defendant carried his burden on the "standing" issue at the suppression hearing. See *United States* v. *Bagley*, 765 F.2d 836, 843 (9th Cir. 1985); *United States* v. *Morales*, 737 F.2d 761, 762-764 (8th Cir. 1984).

B. Respondent's Title To The *Sea Otter* And His Role In The Drug Smuggling Enterprise Do Not Give Rise To A Privacy Interest Under The Fourth Amendment

In holding that respondent had a legitimate expectation of privacy in the *Sea Otter*, the Ninth Circuit departed from the clear teachings of this Court's decisions. The factors cited by the court—respondent's ownership of the *Sea Otter* and his status as a criminal co-venturer with a stake in the seized marijuana—do not give rise to the requisite privacy interest to entitle respondent to challenge the search of the boat. On the contrary, by allowing a defendant to seek the suppression of evidence even though he had made no personal use of the searched conveyance and had relinquished custody and control of it for an extended period, the court of appeals has manifestly and unreasonably expanded Fourth Amendment rights beyond the bounds fixed by this Court.

1. *Respondent's Title To the Sea Otter*

In concluding that respondent had an expectation of privacy in the *Sea Otter*, the court of appeals first relied on "[h]is ownership of the boat" (Pet. App. 2a). But this Court has made clear that title to the object or area searched does not suffice to create a privacy interest under the Fourth Amendment. See, *e.g.*, *Oliver* v. *United States*, No. 82-15 (Apr. 17, 1984), slip op. 11-12; *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983); *Knotts*, 460 U.S. at 285; *Rakas*, 439 U.S. at 143-144 & n.12; *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968); *Katz*, 389 U.S. at 352-353. The "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143; see also *Mancusi* v. *DeForte*, 392 U.S. at 368. Because "[t]he Fourth Amendment protects legitimate expectations of privacy rather than simply places," an

"owner may retain the incidents of title • • • but not privacy." *Andreas*, 463 U.S. at 771. Thus, " 'even a property interest in [the] premises [searched] may not be sufficient to establish a legitimate expectation of privacy • • • .' " *Oliver*, slip op. 11, quoting *Rakas*, 439 U.S. at 144 n.12.[4]

The courts of appeals likewise have recognized that ownership or other proprietary right in the property searched does not itself give rise to a Fourth Amendment privacy interest.[5] As the court explained in *United States* v. *Dyar*, 574 F.2d 1385, 1390 (5th Cir.), cert. denied, 439 U.S. 982 (1978):

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[4] The Court has followed a similar analysis in the comparable area of third-party consent searches. See *United States* v. *Matlock*, 415 U.S. 164, 171 n.7 (1974) (citations omitted):

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

[5] See, *e.g.*, *United States* v. *Gomez*, 770 F.2d 251, 254-255 (1st Cir. 1985); *United States* v. *Willis*, 759 F.2d 1486, 1494, 1498-1499 (11th Cir. 1985); *United States* v. *DeWeese*, 632 F.2d 1267, 1270 (5th Cir. 1980), cert. denied, 454 U.S. 878 (1981); *United States* v. *Ramapuram*, 632 F.2d 1149, 1154 (4th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979); *United States* v. *Dall*, 608 F.2d 910, 914-915 (1st Cir. 1979), cert. denied, 445 U.S. 918 (1980); *United States* v. *Dyar*, 574 F.2d 1385 (5th Cir.), cert. denied, 439 U.S. 982 (1978); *United States* v. *Kelly*, 529 F.2d 1365, 1369 (8th Cir. 1976); *United States* v. *Nunn*, 525 F.2d 958, 959 (5th Cir. 1976); *United States* v. *Hunt*, 505 F.2d 931, 940-941 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975); see also 3 W. LaFave, *Search and Seizure* § 11.3, at 575 (1978); *id.* at 214 n.15, 238 n.145.1 (Supp. 1984). Indeed, the Ninth Circuit itself has previously recognized this principle. See *United States* v. *One 1977 Mercedez Benz*, 708 F.2d 444, 448-450 (9th Cir. 1983).

> Traditional or common law theories of property rights do not automatically confer standing to challenge a search. Property rights in [the] absence of reasonable expectations of privacy in property cannot support a Fourth Amendment claim • • • . Ownership • • • must be accompanied by a cognizable privacy interest in the place or thing searched.

Thus, "[o]wnership alone is not enough to establish a reasonable and legitimate expectation of privacy"; rather, "the total circumstances determine whether the one challenging the search has a reasonable and legitimate expectation of privacy in the locus of the search." *United States* v. *Dall*, 608 F.2d 910, 914 (1st Cir. 1979), cert. denied, 445 U.S. 918 (1980). It is insufficient for a defendant to "offer[] nothing more • • • than • • • bare legal ownership of [the place searched]. While this may adequately establish a property right, he has not sustained his burden of showing that his Fourth Amendment privacy interest has been invaded • • • [because] he 'took normal precautions to maintain his privacy' • • • [or] used the [place] in such a way as to raise a legitimate expectation of privacy." *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979) (citation and footnotes omitted).

To be sure, "by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment." *Rakas*, 439 U.S. at 144 n.12. Ordinarily, an owner "lawfully possesses or controls [his] property" and has "the right to exclude others" (*ibid.*). For this reason, ownership will often be associated with some use or occupancy of the property, including the restriction of other people from it, that gives rise to an expectation of privacy on the part of the owner. See *Oliver*, slip op. 6; *Rakas*, 439 U.S. at 144 n.12; *id.* at 153 (Powell, J., concurring). Accordingly, ownership may be relevant as "one element" in analyzing the existence of a legitimate

privacy interest. *Oliver*, slip op. 11. But in the end it is the expectation of privacy deriving from the way in which the property is used, not the fact of ownership as such, that is the controlling Fourth Amendment standard.

In this case, it is evident that respondent had no privacy interest in the *Sea Otter*. Although he was technically the owner, respondent had never used the boat, had not lived aboard it or kept private quarters on it, and did not utilize it as a repository for personal effects. To the contrary, respondent had purchased the vessel for the specific purpose of having *others* operate it to smuggle drugs. Moreover, the *Sea Otter* was entirely out of respondent's custody and control for a significant period—two months—before the search in question took place in June 1979, and it remained out of his possession for more than two years thereafter while Hunt had it repaired and then used it for commercial fishing in Costa Rica. Nor during that time did respondent undertake in any way to maintain the privacy interest that he now asserts. In these circumstances, respondent's bare title does not establish an expectation of privacy in the *Sea Otter*.[6]

2. *Respondent's Co-Venturer Status And Possessory Interest In the Seized Marijuana*

The court of appeals also premised respondent's privacy interest on the facts that (a) he was engaged in a "joint venture with Hunt for the smuggling of marijuana" and the *Sea Otter*, "when searched, was • • • pursuing the purpose of [respondent's] joint venture" (Pet. App. 2a), and (b) he had a "possessory interest in the marijuana seized, arising from his joint venture" (*ibid.*). See also *United States* v. *Johns*, 707 F.2d 1093, 1099-1100 (9th Cir. 1983),

[6] Indeed, even if respondent had used the *Sea Otter* in such a way that he had a legitimate privacy interest in it at one time, any such interest would have lapsed by virtue of his prolonged relinquishment of the boat to Hunt.

rev'd on other grounds, No. 83-1625 (Jan. 21, 1985); *United States* v. *Mazzelli*, 595 F.2d 1157 (9th Cir. 1979), vacated and remanded *sub nom. United States* v. *Conway*, 448 U.S. 902 (1980). However, under settled Fourth Amendment principles, neither of these aspects of respondent's role in the drug smuggling enterprise created a legitimate expectation of privacy.[7]

a. As discussed above (see pages 10-11, *supra*), the interest in privacy protected by the Fourth Amendment is a personal right, and a defendant may not vicariously assert the rights of third parties as a ground for seeking the

[7] The court of appeals also reasoned that "[w]here a joint venture is being pursued, the mere fact of a joint venturer's absence from the place searched is insufficient to establish abandonment or relinquishment of the property seized" (Pet. App. 2a-3a). This seems true enough as regards property interests; moreover, in the abstract, the court's observation may well be correct even in the case of privacy interests. A person who has an expectation of privacy in certain property, and temporarily entrusts that property to a relative, friend or associate to further a common objective, does not necessarily lose his privacy interest; the continuation of that expectation of privacy would depend on such considerations as the nature and extent of the preexisting privacy interest, the type of property involved, the relationship between the parties, and the terms and duration of the bailment. See generally *United States* v. *One 1977 Mercedez Benz, supra; United States* v. *Rios, supra; United States* v. *Dall, supra; United States* v. *Dyar, supra;* 3 W. LaFave, *Search and Seizure* § 11.3, at 575 (1978); *id.* at 214 n.15, 238 n.145.1 (Supp. 1984). In this case, however, as noted above (see page 16 note 6, *supra*), we believe that any expectation of privacy respondent might otherwise have had was lost when he gave up custody and control over the *Sea Otter* to Hunt for an extended period and made no effort to preserve the privacy interest that he now advances. But more to the point here, the question presented on these facts is not, contrary to the court of appeals' characterization, whether respondent abandoned or relinquished a privacy interest that he had; rather, the issue is whether he had an expectation of privacy in the first place. As we discuss in the text, respondent's status as a co-venturer with a possessory interest in the seized marijuana does not support his privacy claim.

suppression of evidence against him. In particular, confederates in a criminal enterprise—whether called co-conspirators, co-defendants, or co-venturers—"have been accorded no special standing" to raise the Fourth Amendment rights of each other. *Alderman*, 394 U.S. at 172; see also, *e.g.*, *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 10-11; *Stanley* v. *United States*, 447 U.S. 10, 23-24 (1980); *Brown* v. *United States*, 411 U.S. 223, 230 & n.4 (1973). Respondent's position as a co-venturer does not expand the claims he may advance in support of his motion to suppress or entitle him to raise the Fourth Amendment rights of others. Likewise, in analyzing the issue of respondent's own Fourth Amendment rights, his co-venturer status gives rise to no protected expectation of privacy on his part. The fact that respondent acted in league with others in the marijuana smuggling scheme simply does not bear on the question whether he himself had a privacy interest in the *Sea Otter* in the first instance.

In contrast to the decision below, other courts of appeals have recognized that a defendant's participation in a joint criminal venture does not establish a personal expectation of privacy under the Fourth Amendment.[8] As the court explained in *United States* v. *Hunt*, 505 F.2d 931,

[8] See, *e.g.*, *United States* v. *Manbeck*, 744 F.2d 360, 373-374 (4th Cir. 1984), cert. denied, No. 84-1194 (Feb. 19, 1985); *United States* v. *Brown*, 743 F.2d 1505, 1506-1507 (11th Cir. 1984); *United States* v. *Little*, 735 F.2d 1049, 1053, rev'd on other grounds, 743 F.2d 1261 (8th Cir. 1984), cert. denied, Nos. 84-1122 and 84-1126 (Feb. 19, 1985); *United States* v. *Knotts*, 662 F.2d 515, 518 (8th Cir. 1981), rev'd on other grounds, 460 U.S. 276 (1983); *United States* v. *DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981); *United States* v. *Davis*, 617 F.2d 677, 690 (D.C. Cir. 1979), cert. denied, 445 U.S. 967 (1980); *United States* v. *Vicknair*, 610 F.2d 372, 379 (5th Cir. 1980); *United States* v. *Archbold-Newball*, 554 F.2d 665, 678 (5th Cir.), cert. denied, 434 U.S. 1000 (1977); *United States* v. *Galante*, 547 F.2d 733, 739 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Hunt*, 505 F.2d at 940, 941-942.

942 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975):

> [A] principal-agent relationship sufficient to imply culpability may certainly fall short of conferring standing for Fourth Amendment purposes. Defendant's contention flies directly in the face of *Alderman*. • • • .
>
> • • • Fifteen years of Supreme Court decisions stand squarely in the way of defendants' attempt to create a rule of *per se* standing for parties in a principal-agent relationship. This claim of privacy by agency is just the sort of vicarious assertion of Fourth Amendment rights that *Alderman* and *Brown* forbid.

Thus, "[n]either [a defendant's] mere presence in the conspiracy nor the acts of his co-conspirators can give him a legitimate expectation of privacy in the [searched area] where none otherwise exists." *United States* v. *Little*, 735 F.2d 1049, 1053, rev'd on other grounds, 743 F.2d 1261 (8th Cir. 1984), cert. denied, Nos. 84-1122 and 84-1126 (Feb. 19, 1985).

b. Nor does a legitimate expectation of privacy arise merely because respondent, in connection with his role in the drug smuggling scheme, asserted a possessory interest in the marijuana that was seized during the search of the *Sea Otter*.[9] Although at one time it was assumed that "a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment 'standing,' " that "assumption • • • is no longer so." *Salvucci*, 448 U.S. at 90 (footnote omitted).

[9] In fact, the *Sea Otter* was stopped and searched after its cargo of marijuana had been delivered to respondent's ranch, and only marijuana residue was found on the boat. The seizure of that residue did not interfere with respondent's possessory interest. First, because those trace amounts were left aboard the *Sea Otter* after the shipment of marijuana had been unloaded, any interest therein had been abandoned. Second, the Fourth Amendment does not protect a property interest in such de minimis quantities. See *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 15.

The recent decisions of this Court make clear the distinction between a privacy interest in the area or item searched and a possessory interest in the object seized: a search involves a governmental intrusion upon a person's legitimate expectation of privacy in the locus of the inspection or examination, while a seizure entails an interference with a person's possessory interest in the res that was impounded.[10] To conclude that a possessory interest in the seized object establishes a privacy interest in the searched area, as the court below did, confuses these analytically distinct concepts.[11] Indeed, this Court has specifically "decline[d] to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." *Salvucci*, 448 U.S. at 92. Because of the difference between privacy and possessory interests, "legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest, for it does not invariably represent the protected Fourth

[10] See, *e.g.*, *Maryland* v. *Macon*, No. 84-778 (June 17, 1985), slip op. 5-6; *United States* v. *Karo*, No. 83-850 (July 3, 1984), slip op. 6; *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 3; *Salvucci*, 448 U.S. at 91 n.6; see also *United States* v. *Lisk*, 522 F.2d 228, 230-231 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976), subsequent opinion, 559 F.2d 1108 (7th Cir. 1977).

[11] An ownership interest in the seized property may be sufficient in some cases to entitle the owner to challenge the validity of the seizure (as opposed to the search) as a basis for seeking the suppression of that evidence against him. See *Salvucci*, 448 U.S. at 91 n.6. Moreover, the owner may be able to do so even if the property is temporarily out of his possession. See *United States* v. *House*, 524 F.2d 1035, 1042 (3d Cir. 1975). Here, however, in light of his extended relinquishment of the *Sea Otter* to Hunt, respondent had no cognizable interest that was infringed by the seizure of the boat and thus cannot move to suppress the evidence resulting therefrom. See *Place*, 462 U.S. at 705-706 & n.6; *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). In addition, an owner would have "standing" to seek the return of his property insofar as its continued detention (as opposed to the original seizure) interfered with his interest as the title owner; in this case, though, the *Sea Otter* was not detained for a protracted period and in any event was subject to forfeiture because of its use in smuggling marijuana.

Amendment interest" (*id.* at 91). Thus, "[t]he person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation" (*ibid.*). See also *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980).[12]

Of course, the fact that one's personal effects are kept in a place may be relevant to the question whether the person has a reasonable expectation of privacy in that place. See *Rawlings*, 448 U.S. at 105; *Salvucci*, 448 U.S. at 91; *Rakas*, 439 U.S. at 142 n.11, 144 n.12. But this simply reflects the more general proposition that the use to which the searched property was put--including its use as a repository for one's possessions--is one indication of a privacy interest. See *Oliver*, slip op. 6; *Rakas*, 439 U.S. at 144 n.12; *id.* at 153 (Powell, J., concurring).[13] The dispositive issue remains, however, "not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched" (*Salvucci*, 448 U.S. at 93), and "property rights are neither the beginning nor the end of this • • • inquiry" (*id.* at 91).[14]

[12] The "unexamined assumption" (*Salvucci*, 448 U.S. at 90) that a possessory interest sufficient to prove criminal liability also sufficed to confer a Fourth Amendment privacy interest was one of the premises of the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960). In overturning that rule in *Salvucci*, the Court expressly rejected the contention "that possession of a seized good is the equivalent of Fourth Amendment 'standing' " (488 U.S. at 93). Similarly, in *Rawlings* v. *Kentucky*, *supra*, decided the same day as *Salvucci*, the Court squarely held that a possessory interest in the items seized during a search does not establish a privacy interest in the area searched (see 448 U.S. at 105-106).

[13] In this case, it is clear--and neither the court of appeals nor respondent has asserted otherwise--that respondent never used the *Sea Otter* in any way that would in fact give rise to a reasonable expectation of privacy. Rather, the court relied simply on respondent's "possessory interest in the marijuana seized" (Pet. App. 2a).

[14] In *Rakas*, the Court, after explaining that ca[illegible]itors do not have a privacy interest in searched premises, wen[illegible] note that "[t]his is not to say that such visitors could not conte[illegible] lawfulness

Futhermore, even if a possessory interest in the items seized could entitle a defendant to contest the underlying search, an asserted interest in contraband would not support a Fourth Amendment claim. The theory for allowing a possessory interest in the seized objects to authorize a challenge to the search (which, we reiterate, the Court in fact rejected in *Salvucci* and *Rawlings*) is that "[w]hen the government seizes a person's property, it interferes with his constitutionally protected right to be secure in his effects. • • • If the defendant's property was seized as the result of an unreasonable search, the seizure cannot be other than unreasonable." *Rawlings*, 448 U.S. at 118 (Marshall, J., dissenting); see also *id.* at 114 (Marshall, J., dissenting). However, a person can have no lawful possessory interest in contraband that, by definition, he may not legally posses. "Congress has decided—and there is no question about its power to do so—to treat the interest in 'privately' possessing [contraband drugs] as illegitimate • • • ." *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 13; see also *Illinois* v. *Andreas*, 463 U.S. at 771; *United States* v. *Place*, 462 U.S. at 707; *Brown* v. *United States*, 411 U.S. 223, 230 n.4 (1973); cf. *Rakas*, 439 U.S. at 141 n.9 (no privacy interest in stolen car that was searched); *Jones*, 362 U.S. at 267 (person

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of the seizure of evidence *or the search if their own property were seized during the search*" (439 U.S. at 142 n.11 (emphasis added)). This passing statement does not imply that a possessory interest in the items seized is sufficient, without more, to establish a privacy interest in the area searched that would enable the defendant to challenge the search. Rather, it simply reflects the general proposition, discussed above and recognized in *Rakas* itself (439 U.S. at 143-144 & n.12; *id.* at 153 (Powell, J., concurring)), that a person's use of an area as a repository for his personal effects can be indicative of his expectation of privacy in that area. So viewed, it is consistent with the Court's subsequent decisions in *Salvucci* and *Rawlings*; conversely, a contrary reading would not survive those later decisions. See *Rawlings*, 448 U.S. at 115 (Marshall, J., dissenting). Especially since the defendants in *Rakas* had no possessory interest in the seized evidence (see 439 U.S. at 129, 130-131 & n.1, 148), the brief dictum in the *Rakas* footnote—which was not cited by the Court of Appeals in this case—cannot justify the analysis below.

wrongfully present in searched premises cannot claim privacy interest). Because the Fourth Amendment protects only "legitimate" expectations of privacy that "society is prepared to recognize as reasonable" (see *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 11; *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 7), a claimed interest in contraband provides no basis for a defendant to seek to suppress evidence. In accord with these principles, the courts of appeals have recognized that possession of contraband does not give rise to a legitimate Fourth Amendment interest.[13]

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[13] See, *e.g.*, *United States* v. *Manbeck*, 744 F.2d at 374 n.16; *United States* v. *Karo*, 710 F.2d 1433, 1436 (10th Cir. 1983), rev'd on other grounds, No. 83-850 (July 3, 1984); *United States* v. *Bentley*, 706 F.2d 1498, 1505 n.5 (8th Cir. 1983), cert. denied, 464 U.S. 830 (1983) and No. 83-5027 (May 21, 1984); *United States* v. *Parks*, 684 F.2d 1078, 1083 n.7 (5th Cir. 1982); *United States* v. *Bruneau*, 594 F.2d 1190, 1194 n.6 (8th Cir.), cert. denied, 444 U.S. 847 (1979); *United States* v. *Washington*, 586 F.2d 1147, 1154 (7th Cir. 1978); *United States* v. *Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States* v. *Moore*, 562 F.2d 106, 111 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978); *United States* v. *Galante*, 547 F.2d 733, 739-740 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Emery*, 541 F.2d 887, 890 (1st Cir. 1976); *United States* v. *Sacco*, 436 F.2d 780, 784 (2d Cir.), cert. denied, 404 U.S. 834 (1971); *United States* v. *Bozza*, 365 F.2d 206, 223 (2d Cir. 1966); cf. *United States* v. *McCambridge*, 551 F.2d 865, 870 n.2 (1st Cir. 1977) (no privacy interest in stolen suitcase). As the court stated in *Moore* (562 F.2d at 111), "the possessors of such [contraband] articles have no legitimate expectation of privacy in substances which they have no right to possess at all. • • • The narcotics peddler • • • has no privacy interest in the substance • • • ."

We recognize that *United States* v. *Jeffers*, 342 U.S. 48 (1951), can be read to allow a suppression claim to be based on the defendant's interest in seized contraband. However, as discussed below (see pages 25-26, *infra*), *Jeffers* is properly understood in terms of the defendant's legitimate expectation of privacy in the hotel room that was searched, an expectation that was not lost simply because he used the room in part as a storage area for his narcotics. Moreover, insofar as *Jeffers* held that the defendant's possessory interest in the seized contraband was sufficient to confer "standing" to challenge the search, it is inconsistent with subsequent decisions of this Court and therefore is no longer authoritative.

In sum, the Ninth Circuit plainly erred in concluding that respondent had an expectation of privacy in the *Sea Otter* because of his role as a co-venturer with a possessory interest in the seized marijuana.[18]

[18] The court below also noted (Pet. App. 3a) that "to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy." This is plainly a makeweight. "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities" (*Jacobsen*, slip op. 12 (footnote omitted)); thus, the fact that a criminal intends contraband to remain hidden does not establish a Fourth Amendment privacy interest. See *Rakas*, 439 U.S. at 143-144 n.12; *United States* v. *Sardo-Vella*, 760 F.2d 1232, 1236-1237 (11th Cir. 1985). Beyond that, there is no indication that respondent had anything to do with the decision to put either the marijuana or the water in the hold. Cf. *United States* v. *Little*, 735 F.2d at 1052-1053; *United States* v. *Fahnbulleh*, 748 F.2d 473, 477 (8th Cir. 1984). Moreover, the most likely explanation is that the water provided ballast for the boat after its multi-ton cargo of marijuana had been unloaded, not that it was used to conceal the marijuana that was being transported. And at all events marijuana debris was also discovered in plain view on the *Sea Otter*. Finally, as other courts of appeals have recognized, there is no substantial expectation of privacy in the hold of a boat, which is an area open to common access and subject to routine inspections by law enforcement officials. See, *e.g.*, *United States* v. *Lopez*, 761 F.2d 632, 635-636 (11th Cir. 1985); *United States* v. *Manbeck*, 744 F.2d at 384 n.37; *United States* v. *Herrera*, 711 F.2d 1546, 1553 n.12 (11th Cir. 1983); *United States* v. *Bent*, 707 F.2d 1190, 1193 (11th Cir. 1983), cert. denied, No. 83-5835 (Apr. 30, 1984); *United States* v. *Freeman*, 660 F.2d 1030, 1034 (5th Cir. 1981), cert. denied, 459 U.S. 823 (1982); *United States* v. *Willis*, 639 F.2d 1335, 1337 (5th Cir. 1981); *United States* v. *Williams*, 617 F.2d 1063, 1075, 1085-1086 (5th Cir. 1980) (en banc). See generally *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983); *United States* v. *Ross*, 456 U.S. 798, 805-806 & nn.6, 7 (1982); *Carroll* v. *United States*, 267 U.S. 132, 149-153 (1925); 14 U.S.C. 89(a); 16 U.S.C. 971f; 19 U.S.C. 1581(a).

3. The Conjunction Of Respondent's Asserted Interests

The decision below cannot be justified by the court of appeals' unexplained reliance on the foregoing factors in "conjunction" rather than individually (Pet. App. 2a). As demonstrated above, neither respondent's title to the *Sea Otter* nor his role as a co-venturer with a possessory interest in the seized marijuana gave rise to an expectation of privacy in the searched vessel. We fail to see how these considerations, which separately afford no analytical basis for a claim of privacy, can be taken in the aggregate to establish a cognizable privacy interest. The Ninth Circuit cannot evade this Court's precedents by purporting to rely on a cumulation of legally insufficient factors.

That is not to say, of course, that an expectation of privacy cannot arise from a combination of circumstances even though each individually would fall short of establishing a privacy interest. But the individual factors must bear on and contribute to the defendant's claim of privacy before their combined effect becomes material. By contrast, for respondent and other defendants in like situations, neither their title to the searched conveyance nor their role in a joint drug smuggling enterprise advances the asserted privacy interest in any way, and these factors take on no greater force when considered together rather than separately.

Finally, *United States* v. *Jeffers*, 342 U.S. 48 (1951), upon which the Ninth Circuit relied (Pet. App. 2a), does not support the decision below. The defendant's "standing" in *Jeffers* was based on two factors: (1) his interest in the searched hotel room rented by his aunts, including the facts that the aunts had given him a key and allowed him to use the room at will and that he had in fact often entered the room for various purposes, and (2) his claimed ownership of the seized narcotics that he had hidden in the room. As the Court explained in *Rakas* (439 U.S. at 136) and *Salvucci* (448 U.S. at 90-91 n.5), *Jeffers*

rested on the confluence of these factors to establish that, in light of the defendant's access to and use of the room, he had a reasonable expectation of privacy in the premises. See also *Jones*, 362 U.S. at 259, 265. However, *Jeffers* does not suggest that an ownership or other proprietary interest in the searched area necessarily demonstrates a privacy interest or that "legal ownership of the seized good [is] sufficient to confer Fourth Amendment 'standing.'" *Salvucci*, 448 U.S. at 90-91 n.5; see also *id.* at 116, 118 (Marshall, J., dissenting).

While we do not disagree, for the reasons discussed above, that "[o]wnership of both the place searched and the item seized" (Pet. App. 2a) may often be relevant to a defendant's expectation of privacy, that general observation provides no basis for the legal rule formulated by the court of appeals that a defendant who owns a conveyance used in a collective scheme to transport contraband drugs in which he has an interest is entitled, without more, to challenge the validity of a search of the conveyance. Bare title and concerted criminal activity do not give rise to a reasonable expectation of privacy on the part of an absentee owner who had never personally used the conveyance and had relinquished custody and control of it for an extended period.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1985

No. 84-1717

In The
Supreme Court of the United States
October Term, 1985

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL ROBERT QUINN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Whether the sole owner of a ship has "standing" under the Fourth Amendment to contest the seizure and resulting search of this vessel because he was the registered and actual owner of the ship, the ship was pursuing the owner's joint venture at the time of the seizure, the particular item seized belonged to the owner of the ship, and reasonable precautions had been taken to preserve the privacy of the ship?

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BRIEF FOR RESPONDENT

JUDGMENT BELOW

On January 20, 1984, Mr. Quinn was sentenced to imprisonment for three years, and fined $15,000.00. [J.A. 44] The Court of Appeals' decision remanding this case for a hearing on Mr. Quinn's motion to suppress is reported at 751 F.2d 980.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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STATEMENT OF THE CASE

On August 4, 1983, a four count indictment was returned in the United States District Court for the Northern District of California.[1] (J.A. 18-20) The indictment charged Mr. Quinn with importation of marijuana in violation of 21 U.S.C. Section 952(a); possession with intent to distribute, in violation of 21 U.S.C. Section 841(a)(1); conspiracy to import, in violation of 21 U.S.C. Section 963; and conspiracy to possess with intent to distribute, in violation of 21 U.S.C. Section 846. (J.A. 18-20)

[1]This indictment came about as a result of the testimony of one George Mayberry Hunt. (J.A. 42) Hunt was charged in 1981, for his involvement with others in the importation of 16,000 pounds of marijuana at Bodega Bay, California, which occurred in February 1976. (J.A. 39) After Hunt was extradited from Costa Rica in 1983, he entered into a "plea bargain" with the prosecutor. (J.A. 42) In return for his testimony against Mr. Quinn concerning the alleged 1979 charges, Hunt was permitted to plead guilty and given a probationary sentence. He was then allowed to return to Costa Rica. Both his plea agreement and the terms of his probation require him to return to the U.S. to testify at any trial of Mr. Quinn.

On August 8, 1983, Mr. Quinn was arrested in San Diego while living on board the fishing vessel, *Sea Otter*.[2] The vessel was seized for civil forfeiture proceedings, and Mr. Quinn appeared in San Diego on that same date.[3] After waiving removal hearing, he appeared in San Francisco for arraignment proceedings on September 2, 1983. (J.A. 2)

On October 10, 1983, Mr. Quinn moved to suppress evidence obtained after the Coast Guard stopped, seized and searched his vessel, the *Sea Otter*, in June 1979. (J.A. 25-28) On November 18, 1983, the district court denied this motion for an alleged lack of "standing". (Pet.App. 8a-9a)[4]

Mr. Quinn then entered a conditional plea of guilty to count three of the indictment. (J.A. 11) Pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, and with the concurrence of the government, Mr.

[2]The register length of the vessel is 54.2 feet; her register breadth is 19.6 feet and her depth 8.7 feet.

[3]These proceedings occurred before a U.S. magistrate in San Diego. During his arraignment, a Federal public defender (appearing for all new arrestees that date) stated that Michael Quinn had been in San Diego living on board the *Sea Otter* since February, and had been working as a commercial fisherman.

[4]The district court judge erroneously thought that Mr. Quinn had "committed the vessel to a charter". (Pet. App. 9a) The government had argued a number of attempted justifications for the Coast Guard's seizure and search, including *inter alia*, 19 U.S.C. Section 1581(a), a "border search" and an "outgoing border search" and had sought to justify the initial stop by California Fish and Game officers as a "regulatory inspection." (J.A. 29-38) The district court never held an evidentiary hearing, made no findings of fact, and never ruled on the merits of the motion.

Quinn specifically reserved for appeal the issue of whether he had "standing" to move to suppress evidence illegally obtained after the seizure of the *Sea Otter* in June 1979. (J.A. 21)

The Court of Appeals reversed the district court, and remanded the case for consideration of the merits of Mr. Quinn's motion to suppress. *United States v. Quinn*, 751 F.2d 980 (9th Cir. 1984) The Court of Appeals held that the conjunction of the following factors conferred a sufficient Fourth Amendment interest to permit litigation of the suppression motion:

(1) Mr. Quinn's ownership of the boat;

(2) his possessory interest in the marijuana seized;

(3) the fact that the boat was pursuing the purpose of his joint venture and thus, he had not relinquished his interest in the *Sea Otter*;

(4) the fact that in order to seize the marijuana, it was necessary for government agents to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy. *Quinn* 751 F.2d 980, 981.

In response to Mr. Quinn's motion to suppress in the district court, the prosecution submitted an unsworn statement of facts together with the affidavit of D.E.A. Agent Wesley Dyckman. (J.A. 29-43)

According to the prosecution statement, in 1978, Mr. Quinn approached George Mayberry Hunt in Costa Rica to participate in a plan to import marijuana by boat from Colombia to Humboldt County, California. The agreed

upon plan called for Hunt to take Mr. Quinn's vessel, obtain a crew for the vessel, pick up a load of marijuana, bring it to Mr. Quinn's ranch in Humboldt County, and return to Mexico with the vessel and crew members. (J.A. 29, 39-40) Mr. Quinn purchased the *Sea Otter*, a fishing vessel, in San Diego, California.[5] (J.A. 29, 39-40)

In the spring of 1979, Michael Quinn entrusted the *Sea Otter* to three South Americans who had been recruited by Hunt. (J.A. 30, 40) The *Sea Otter*, pursuant to the joint venture, took on a load of marijuana off the west coast of Colombia. Mr. Quinn was the owner of this marijuana. The *Sea Otter* proceeded north until it was off the coast of Humboldt County. At that time, pursuant to their previous agreement, Hunt contacted Michael Quinn by radio. The marijuana was subsequently off-loaded at Spanish Flat in the vicinity of Mr. Quinn's ranch. Due to bad weather, the ship was forced to port in Drake's Bay. (J.A. 39-40) At Drake's Bay, California Fish and Game officers boarded the *Sea Otter* purportedly to search for "illegal abalone." No seizure was made at this time, nor was the crew detained. The next morning, the California State officers returned, then left the vessel, and apparently called the Coast Guard. (J.A. 30, 40) Thereafter, Customs Patrol Officers on board the United States Coast Guard cutter *Point Chico* intercepted the *Sea Otter* and boarded it. (J.A. 30) The *Sea Otter* was then located at a point described as 37° 43′ N/ 122° 45′

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[5]The purchase date reflected on the title provided counsel in discovery is February 12, 1979. There is no evidence to dispute that between this date and spring 1979, Mr. Quinn had exclusive custody and control of the vessel.

W approximately twelve miles offshore and four miles south by southwest of the large navigation buoy marking the approach to San Francisco. (J.A. 30) Two Customs officers and one Coast Guard officer then seized the *Sea Otter* and took it to the United States Coast Guard Station at Yerba Buena Island, a distance of approximately 15 miles from the point of seizure. (J.A. 30-31) There, the forward holds of the vessel were pumped out and a small amount of "suspected marijuana" (J.A. 31) was found.[6] Hunt and the other crew members were arrested, but were later released after formal charges were not brought. (J.A. 31) Thereafter, the *Sea Otter* underwent repairs in the San Francisco Bay Area for approximately nine months. (J.A. 31) The *Sea Otter* was turned back over to Mr. Quinn in Punta Arenas, Costa Rica in November, 1981. (J.A. 41)

On August 8, 1983, Michael Quinn was arrested while living on board the fishing vessel *Sea Otter*, in San Diego, California.[7]

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[6]Contrary to the suggestion in the government's brief (p. 24 n.16), no marijuana was ever seized in plain view. The only marijuana was that taken from the holds of the vessel. (J.A. 31, 40-41) Also contrary to the government's assertion, there was never any "fire" on board the *Sea Otter* at any time.

[7]The government has never suggested that anyone other than Mr. Quinn had exclusive custody and control of the vessel between November 1981 and August 8, 1983, the day of Mr. Quinn's arrest.

SUMMARY OF ARGUMENT

A "seizure" is a meaningful interference by government agents with a person's possessory interest in property. A "search" is an infringement by government agents of a reasonable expectation of privacy. "Standing" to contest a seizure is fundamentally distinct from "standing" to contest a search.[8] "Standing" to contest a seizure which invades a property interest is premised on the property interests of the aggrieved party. "Standing" to contest a search depends upon whether the aggrieved party has a reasonable expectation of privacy in the area searched. While ownership of the item seized or the area searched is only one factor to consider in deciding whether one has an expectation of privacy sufficient to contest a search, ownership or possessory interest in the item seized is the determinant of standing to object to a seizure.

In this case, Custom Officers seized Mr. Quinn's vessel. After the seizure, they moved the vessel many miles. During the continued detention of the boat in Coast Guard custody, government agents conducted a search by pumping the holds of the vessel, and seizing a small amount of marijuana. The search in this case was the fruit of the unlawful seizure of the vessel. Under the rule of *Wong Sun v.*

[8]In *Rakas v. Illinois*, 439 U.S. 128 (1978) the Court noted that analysis of issues such as the one in this case requires a determination of whether the disputed search or seizure has infringed an interest of the defendant that the Fourth Amendment was designed to protect. The issue of "standing" is properly one of substantive Fourth Amendment doctrine. *Rakas*, 439 U.S. at 141. Both parties, however, have used the rubric "standing" to discuss the issue of whether, assuming the illegality of the governmental seizure and search in this case, that action infringed Mr. Quinn's Fourth Amendment rights.

United States, 371 U.S. 471, 484-488 (1963), the results of the seizure, assuming its illegality, must be suppressed.

The government's analysis of this case exclusively addresses the issue of the search. In so doing, it ignores the temporal sequence of events, and fails to address the legality of the seizure, which was the prerequisite of the ultimate search.

Mr. Quinn's ownership of the vessel, even exclusive of his proprietary interest in the marijuana seized, gives him standing to contest the legality of the seizure of the vessel. The fact that the vessel was employed in a joint venture and was manned by Mr. Quinn's agents demonstrates that there was no relinquishment or abandonment of his interest in the vessel. The facts show that Mr. Quinn had joint control and supervision of the *Sea Otter* and was in constructive possession of the vessel and its contents.

Because the seizure was the basis for the ultimate search, Mr. Quinn need demonstrate only that he has an adequate property interest which was infringed by the seizure of his vessel. The history of the Fourth Amendment demonstrates a universal recognition of the legal rights of shipowners to contest the legality of the seizure of their vessels.

In any event, these same factors coupled with the fact that the item seized (marijuana) was in a hidden area of the boat, showing that reasonable precautions to preserve privacy had been taken, provide Michael Quinn standing to object to the search of the vessel. Under *Rakas v. Illinois*, 439 U.S. 128, 143-149 (1978), *Rawlings v.*

Kentucky, 448 U.S. 98, 104-106 (1980), and *United States v. Salvucci*, 448 U.S. 83, 91-93 (1980), standing to contest a search as opposed to a seizure, is measured by a multifactor test to determine whether the defendant has a reasonable expectation of privacy in the area searched. Ownership of that area, or a possessory interest in it, is one important factor. Ownership of the item seized, in this case drugs, while not determinative, is also important. The absence of the defendant at the time of the search does not negate standing, especially if the area searched is being used jointly by the defendant and others pursuant to agreement or joint arrangement. Finally, facts demonstrating reasonable efforts to maintain privacy by keeping items from the public view, support standing to object to a search.

Under *United States v. Jeffers*, 342 U.S. 48, 49-50 (1951) and *Bumper v. North Carolina*, 391 U.S. 543, 546-548 (1968), a possessory interest in both the *area searched* and the *items seized* as a result of the search, provides standing to a defendant to contest the legality of the *search*.

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ARGUMENT

I

MR. QUINN'S POSSESSORY INTEREST IN THE VESSEL WAS SUFFICIENT TO CONFER STANDING TO OBJECT TO ITS UNLAWFUL SEIZURE

A "search" occurs when the government infringes a reasonable expectation of privacy. A "seizure" occurs

when the government acts so as to cause a meaningful interference with a person's property interest. *Maryland v. Macon*, 472 U.S. —, 105 S.Ct. 2778, 2782 (1985); *United States v. Jacobsen*, 466 U.S. —, 104 S.Ct. 1652, 1656 (1984); 1 W.LaFave, *Search and Seizure*, Section 2.1(a) at 221-224. The government's argument in this case has confused the concept of "seizure" with that of "search" and has collapsed the analysis to focus exclusively on the search.[9] It fails to recognize that the search was the fruit of the vessel's seizure.

A variety of governmental actions occurred in this case. On two occasions California Fish and Game wardens stopped and boarded the vessel. Officers on board a Coast Guard cutter boarded the vessel. They then seized the vessel, conveyed it many miles, detained it at the Coast Guard facility and conducted a search by pumping out the holds. It was this search which produced the marijuana at issue in the case. Even assuming the validity of the initial boarding by the Coast Guard personnel [cf. *United States v. Villamonte-Marquez*, 462 U.S. 579, 592-

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[9]The government's brief seeks to recharacterize the legal issue in the case. It completely ignores the primacy of the seizure. In the Court of Appeals both parties recognized that the search was secondary to the seizure which preceded it. For example, the question presented in Mr. Quinn's brief before the Court of Appeals was: "Whether defendant MICHAEL ROBERT QUINN had standing to contest the *seizure* and search of the vessel "Sea Otter" in 1979, when he was the owner of the vessel which was *seized* and searched, and the owner of the item *seized?*" (emphasis added) The government's brief in the Court of Appeals stated the issue as: "Whether the district court's ruling, that defendant QUINN did not have standing to contest the *seizure* and search of the Fishing Vessel Sea Otter when he relinquished control of the vessel and its contents to others, was clearly erroneous?" (emphasis added)

593 (1983)], the defendant contests the validity of the *seizure* and *detention* of the vessel. Only as a result of this seizure did the ultimate search occur. If the defendant's Fourth Amendment interests were violated by the *seizure*, the results of the search which flowed from the seizure must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484-488 (1963); *United States v. Place*, 462 U.S. 696, 707-710 (1983).

The Court has consistently recognized the conceptual distinction between searches and seizures, and the analytically distinct interests that the Fourth Amendment is designed to protect with respect to each. In *Katz v. United States*, 389 U.S. 347 (1967) Justice Stewart, writing for the Court, noted that the Fourth Amendment involves much more than protection against searches of private places:

> . . . In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. 389 U.S. at 350.

The Fourth Amendment has often been invoked to challenge the unlawful seizure of the person. *Dunaway v. New York*, 442 U.S. 200, 207 (1979); *Beck v. Ohio*, 379 U.S. 89, 90-91 (1964). Yet a privacy interest is not a prerequisite to object to the unlawful seizure of one's person. In fact, one has no privacy expectation in one's appearance, voice, or physical characteristics systematically

displayed to the public. *United States v. Dionisio,* 410 U.S. 1, 14 (1973). Nonetheless, the Court has repeatedly recognized the distinct right to be free from unreasonable seizures, including seizures of the person. See e.g. *Terry v. Ohio,* 392 U.S. 1, 8-11 (1968); *Florida v. Royer,* 460 U.S. 491, 498-500 (1983). Of course, evidence flowing from an unlawful seizure must be suppressed. *Davis v. Mississippi,* 394 U.S. 721, 724-728 (1969).

An ownership interest alone in the seized property is sufficient in this case to entitle the owner to challenge the validity of the seizure (as opposed to the search) as a basis for seeking the suppression of evidence against him. See *Salvucci,* 448 U.S. at 91 n. 6; *Place,* 462 U.S. at 707-710; *United States v. Lisk,* 522 F.2d 228, 230 (7th Cir. 1975). The proper analysis of this case requires a focus on precisely what government act infringed which Fourth Amendment interest. The facts show that it was a *seizure* which infringed Mr. Quinn's property right in the seized vessel which *led* to the search that uncovered marijuana. The government's brief blithely ignores the seizure to focus exclusively on the ultimate search and defendant's privacy interests.

A. The History Of Vessel Seizures

The history of the Fourth Amendment shows that the Framers had shipowners in mind when providing for protection from improper seizures.[10]

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[10]The Court has looked to history to determine whether "certain types of government intrusion were perceived to be objectionable by the Framers of the Fourth Amendment." *Rakas,* 439 U.S. at 153 (Powell, J., concurring) *United States v. Chadwick,* 433 U.S. 1, 7-9 (1977).

Under Charles I, Parliament levied a tax on poundage and tonnage of sea vessels. To enforce the Act, the Privy Counsel extended the right to all the King's messengers to enter onto any vessel. This became known ultimately as the "writ of assistance".[11] In 1696, William III made like powers available to British officers in America.[12] Though the writs permitted search of land structures in daytime, Customs officers in the American colonies could search any vessel day or night to detect if taxes were owed, and later on, to search for smuggled goods.[13]

Thirty years later, the passage of the Molasses Act increased the use of writs of assistance by Customs officers who searched and seized vessels which smuggled goods.[14] In 1761, *Paxton's Case* was brought after sixty-three Boston merchants, some of them shipowners, petitioned the court for an end to the writs of assistance.[15] James Otis' eloquent but unsuccessful presentation in this case led John Adams to comment:

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[11]William Holdsworth, *History of the English Law* (3rd Ed., London 1926) Vol. VI, p. 70 fn 42; Paul de Raypin-Thoyras, *History of England* (London, 1747), II, p. 285.

[12]The statute of 7 and 8, William III, ch. 22 Sec. 6 (1696).

[13]Claude A. Van Tyne, *Causes of the War of Independence,* Vol. III, pp. 3-5, 93, 95, 114. William B. Weeden, *Economic and Social History of New England* (Boston, 1890), II, p. 671.

[14]William S. McClellan, *Smuggling in the American Colonies* (New York, 1912), p. 43.

[15]Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (New York, 1935), p. 57.

> Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child independence was born.[16]

During the same year as *Paxton's case*, the case of *Ewing v. Cradock* arose.[17] The plaintiff in this action was the owner of a ship and cargo which had been seized for violation of the revenue laws. The ship had been libelled in the admiralty court in a forfeiture action. With the permission of the admiralty court, the owner of the ship had agreed to pay half the value of the property in exchange for its return. The shipowner then sued the collector in trespass for the wrongful seizure of his ship. This case is significant because it reflects one of the first colonial challenges to the unlawful seizure of a vessel, although the action was technically noted to be in trespass. The plaintiff was the owner of the ship which had been seized.

The smuggling in the Colonies was not deterred by the seizure of vessels and continued up until after the passage of the Stamp Act in 1765. At that time, the writs of assistance were still being executed by Customs officers. In 1763, another order came from England for the stricter enforcement of the Customs and Molasses Act laws. The crown adopted the effective expedient of directing the commanders of all ships on the American coast to act as officers of the customs and to seize all vessels and cargoes thought to be in violation of the Molasses Act.[18]

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[16]*Works of John Adams*, Vol. X, pp. 247-48.

[17]Josiah Quincy, *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay*, 1761-1772 (Boston, 1865), pp. 402-408.

[18]McClellan, p. 82.

In 1764, after the conclusion of the Seven Year War, England needed additional financing. As a result, The Sugar Act of 1764, was passed which placed a less unreasonable duty on the importation of sugar and molasses. This Act was rather ineffective in that the colonists had already become accustomed to the smuggling of molasses and sugar without paying any taxation or duties. Even though this tax was a lesser amount, the American colonies still resisted payments.[19] At Newburg's, for example, a seizure of molasses at sea was rescued by colonists in half a dozen one-man boats. The boats went after the customs officer, took the goods from him and the boat he was in, and left him to stay the night on the beach.[20]

In 1768, a riot resulted when officials seized John Hancock's sloop, *Liberty* under a writ of assistance for landing Madeira wines without payment of duty. The sloop was taken out and anchored under the guns of a man-of-war in the harbor. A riot occurred because of the violence of the seizure and the crowd's belief that the seizure made at sunset was illegal due to their erroneous impression that the restriction in the writ of assistance to daytime search of buildings applied to vessels as well.[21]

The *Liberty* was later adjudged forfeit in the Admiralty Court and the ship was bought by the collector of Boston. The collector used the vessel as a coast guard

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[19]Id. at pp. 72-93.

[20]Lasson, p. 68.

[21]Quincy, 1761-1772, pp. 456-464; Hunt, *Political History of England*, Vol. X, pp. 88-89.

until 1769 when a Newport mob, provoked by the *Liberty's* seizure and that of other vessels on unfounded suspicions and by the crew's insolence, scuttled and burned the ship.[22]

Many of the riots and acts of independence antecedent to the Revolution occurred as a result of the customs officers' use of the general writs of assistance to seize and search vessels. The Fourth Amendment is recognized to be a direct result of these unlawful searches and seizures and the abuses imposed by the British customs officers.[23] By enacting the Fourth Amendment, the Framers of the Constitution intended to protect shipowners, among others, from the wrongful seizure and search of their vessels. It should be noted that many of the members at the Federal convention had vested interests in shipping and trading.[24]

Early cases interpreting the Constitution dealing with vessels show that shipowners were one of the specific class of individuals intended to be protected by the Fourth Amendment. In the case of *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804),[25] a shipowner sued a naval captain

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[22]Lasson, p. 72.

[23]Joseph J. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States*, 3 University of Richmond Law Review, pp. 293-298 (1969).

[24]Charles A. Beard, *Economic Interpretation of the Constitution of the United States* (1935), pp. 41, 151.

[25]At that time Congress had passed a statute making it unlawful for American ships to travel to French ports. The Act authorized the seizure of all ships suspected of violating this law. The President then expanded upon this statute and ordered the seizure of American ships traveling to or from French ports. An American vessel acting pursuant to the President's orders seized a ship traveling from a French port. The ship was acquitted and the shipowner sued the naval captain for trespass.

for trespass and the seizure of his vessel. This suit by the ship's owners for trespass was in essence a suit for recompense for the unlawful seizure of the vessel.

In the case of *The Appollon*, 22 U.S. (9 Wheat) 362, 363 (1824), the owner and master of a ship sued for damages resulting from the unlawful seizure of his vessel.[26] See also, *Otis v. Bacon*, 11 U.S. (7 Cranch) 589 (1813); *Otis v. Watkins*, 13 U.S. (9 Cranch) 339, 353 (1815); *Gelston v. Hoyt*, 16 U.S. (3 Wheat) 246, 305 (1818). *All* of these cases show that historically the shipowner was entitled to contest the legality of the seizure of his vessel at sea, whether or not he was present on the vessel at the time of seizure. Historically shipowners were recognized as one of the classes of individuals protected by the Fourth Amendment. The Fourth Amendment should not at this juncture be construed to deprive a shipowner of standing to contest the legality of the seizure of his vessel.

B. Michael Quinn's Ownership Interest

The government seems to acknowledge that Mr. Quinn's ownership of the seized vessel entitles him to challenge the validity of the seizure in this case. (G.B. p. 20 n. 11) It argues, however, that there was an "abandonment" which precludes a valid assertion of ownership as a basis to challenge the seizure (Id.) Mr. Quinn cannot be held to have abandoned any interest in the vessel. He was the person who had both actual ownership and legal

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[26]Federal officers had seized the ship on the suspicion of smuggling. A condemnation action was brought and the ship was acquitted. The shipowner then sued the officers for damages resulting from the unlawful seizure of the vessel. The defense at that time to the action was that there was probable cause for the seizure.

title to the vessel.[27] At no time did he ever evidence any intent to relinquish the property [cf. *Abel v. United States*, 362 U.S. 217, 240-241 (1960)], nor could the entrustment of the vessel to Hunt, his co-venturer, fairly be construed as a relinquishment of his property interest in the *Sea Otter*. This entrustment took place within the ambit of their mutual agreement to use the vessel. Their agreement did not divest Quinn of his interest, but indicated mutual and joint control, and constructive possession by Quinn. Use of property pursuant to joint venture or agreement maintains the owner's interest in the property. *United States v. Little*, 735 F.2d 1049, 1052-1054 (8th Cir. 1984) *rev'd on other grounds* 743 F.2d 1261, *cert. denied* Nos. 84-1122 and 84-1126 (February 19, 1985); *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984); *United States v. Freire*, 710 F.2d 1515, 1519 (11th Cir. 1983); *United States v. Perez*, 700 F.2d 1232, 1236 (8th Cir. 1983); *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982) The seizure of the vessel while it was going about his business implicated Quinn's possessory interest. His absence at the time of the seizure does not preclude his objection, for the owner of property may assert an objection to the seizure of that property even if it is temporarily out of his physical possession. *United States v. Haes*, 551 F.2d 767, 769-770 (8th Cir. 1977) (owner of films who directed employees to mail them to theaters pursuant to lease agreement had standing to contest the seizure of films by transport service); *United States v. Wilson*, 536 F.2d 883, 885 (9th Cir. 1976) (defendant has standing if he entrusts belongings to companion for storage in companion's bags); *United States v. Kelly*,

[27]The government acknowledged this in the stipulation for civil forfeiture of the *Sea Otter*, which noted that Mr. Quinn's "sole interest" in the vessel had been verified. (J.A. 50)

529 F.2d 1365, 1369-1370 (8th Cir. 1976) (bookstore proprietor had standing to object to warrantless FBI seizure of books and magazines addressed to him, when seized from common carrier); *United States v. House*, 524 F.2d 1035, 1042 (3rd Cir. 1975) (no question of an owner's standing to object to a *seizure* of his property without consent and without the benefit of any process, even when a third party has temporary possession of that property. Owner had given tax records to accountant); *United States v. Canada*, 527 F.2d 1374, 1378 (9th Cir. 1975) (owner of suitcase had standing to contest search and seizure even though actual custody of suitcase had been given to her companion who also shared access to it); *United States v. Mulligan*, 488 F.2d 732, 736-737 (9th Cir. 1973) cert. denied 417 U.S. 930 (1974) (car owner could object to its search though he had no control over the car when it was searched, had registered it under a fictitious name and had parked it in an acquaintance's driveway for over two months); *United States v. Lonabaugh*, 494 F.2d 1257, 1262 (5th Cir. 1973) (owner of suitcase had standing to contest its seizure and search even though baggage had been given to airline personnel and baggage checks given to companion at time of seizure); *United States v. Eldridge*, 302 F.2d 463, 464-465 (4th Cir. 1962) (owner of car had standing to contest search even though he had given keys and permission to friend to use car on day of search).

Nor does the fact that it was Mr. Quinn's co-venturers and agents who were on the boat when it was seized divest him of his property interest. In *United States v. Schaefer, Michael and Clairton*, 637 F.2d 200 (3rd Cir. 1980), the president of a corporation and owner of the trucks which delivered the company's products objected

to the seizure of five trucks which were stopped while being driven by employees. The court held that Schaefer as owner of the trucks and Clairton Slag, as the corporation with a possessory interest the time of the seizure, both had standing to object to the trucks' seizure. The entrustment of the trucks to drivers (as employees or agents) did not divest Schaefer or the corporation of their possessory interests or preclude assertion of a Fourth Amendment objection to the seizures. *Schaefer*, 637 F.2d at 203.

The government's position erroneously suggests that presence at the time of the seizure is the *sine qua non* for the valid objection to a seizure of property. This Court has repeatedly ruled otherwise. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) the defendant objected to the seizure of his car from the driveway in front of his home. At the time of the seizure he was miles away, and in custody. 403 U.S. at 447. This was no legal impediment to his valid objection to the seizure. In *Alderman v. United States*, 394 U.S. 165 (1969) the owner of the property where illegally intercepted conversations were seized, had standing to object to their seizure, "whether or not he was present or participated in those conversations." 394 U.S. at 176.

The forcible seizure and detention of the vessel *Sea Otter* which led to the search, infringed the shipowner's possessory interests. He should have been permitted to litigate his Fourth Amendment claim on its merits.

II

THE CONJUNCTION OF FACTORS IN THIS CASE ALSO GAVE MR. QUINN A REASONABLE EXPECTATION OF PRIVACY

Because the search in this case was the fruit of an earlier unlawful seizure, expectation of privacy in the area searched need not be established for Quinn to seek suppression of the small amount of marijuana seized. The facts show Mr. Quinn to have had such an expectation in any event. The government has engaged in a casuistical dissection of each of the factors set forth in the Court of Appeals' opinion. (G.B. 13-24) The government complains that each factor in this case is in and of itself insufficient. (G.B. 13-24) The combination of factors in this case clearly constitute a showing of a reasonable expectation of privacy, which was infringed by the search.

A. Ownership Of The Place Searched And Item Seized

First, Mr. Quinn was the owner of the boat which was the place searched. Because of his relationship with those on board, he was in constructive possession of the boat and its contents. Ownership is a "bright star" by which courts have been guided. *United States v. Freire*, 710 F.2d 1515, 1519. (11th Cir. 1983) Ownership of the place searched is an important factor in determining standing to object to a search. See, *Rakas*, 439 U.S. at 148; *Salvucci*, 443 U.S. at 90 n.5.

The government has suggested that the fact the *Sea Otter* was not used by Mr. Quinn for a two year period after the seizure should be considered in the "standing" analysis (G.B. 8). A more appropriate analysis focuses

on the proprietary and possessory interests of the movant up to and including the time of the seizure of the property. The subsequent disposition of property in response to an unlawful seizure is clearly not appropriately considered in determining valid Fourth Amendment interests. *Walter v. United States,* 447 U.S. 649, 658 n. 11 (1980); *United States v. Newman,* 490 F.2d 993, 995 (10th Cir. 1974). In any event, Mr. Quinn did retake the vessel, was arrested while living on the vessel, and was the only person in the world to have an interest in the vessel.

Second, Mr. Quinn was the owner of the item seized, the marijuana. The Court has recognized that ownership of the item seized, while not determinative, is relevant and important on the issue of whether the owner has a reasonable expectation of privacy in the area searched. In *Rawlings,* the Court held that defendant's ownership of the drugs was "undoubtedly" one fact to be considered in the case 448 U.S. at 105. In *Rakas* the court found no standing because petitioners failed to allege *inter alia,* an interest in the property seized. 439 U.S. at 148. In this regard, the government makes two objections. First, it contends that Quinn can have no interest in a "*de minimus*" quantity of marijuana (G.B. p. 19 n. 9) Second, the government contends that no one can have an interest in contraband for Fourth Amendment purposes. (G.B. 22-23) In arguing the "*de minimus*" point, the government simply misconstrues *United States v. Jacobsen,* 466 U.S. —, 104 S.Ct. 1652 (1984). *Jacobsen* held that since government agents had already legitimately seized a large quantity of cocaine, the destruction of a trace amount in a chemical test did not infringe any additional Fourth Amendment interest. *Jacobsen does not* make Fourth Amendment protections hinge on the amount or size of the item seized.

In arguing that one's interest in contraband cannot be considered to determine standing, the government again confuses a privacy interest with a possessory one, and argues in the face of repeated holdings of this Court to the contrary. Of course, one cannot have a reasonable expectation of privacy in contraband which is in plain view. *Texas v. Brown,* 460 U.S. 730, 738 (1983). *United States v. One 1977 Mercedes Benz,* 708 F.2d 444, 448 (9th Cir.). The issue here, however, is whether the possessory interest of a defendant in contraband seized as a result of a search is relevant as a consideration to determine whether that defendant has a privacy interest to allow an objection to the search that uncovered the contraband. In *Rawlings* this Court held that, while not conclusive on the issue, Rawlings' "ownership of the drugs is undoubtedly one fact to be considered" in determining whether he had a reasonable expectation of privacy in the place searched. 448 U.S. at 105. In *Trupiano v. United States,* 334 U.S. 699 (1948), the government sought to justify a warrantless seizure of property (a still) on the grounds that it was contraband. The Court ruled:

> The fact that they actually seized only contraband property, which would doubtless have been described in a warrant had one been issued, does not detract from the illegality of the seizure. See *Amos v. United States,* 255 U.S. 313; *Byars v. United States,* 273 U.S. 28; *Taylor v. United States, supra* (286 U.S. 1) 334 U.S. at 707.

In *United States v. Jeffers,* 342 U.S. 48 (1951) this Court rejected the same argument the government makes here. After the government urged that the Congressional

determination that "no property rights shall exist" in contraband goods meant that no property rights "within the meaning" of the Fourth Amendment, exist in the narcotics seized, the Court held:

> We are of the opinion that Congress, in abrogating property rights in such goods, merely intended to aid in their forfeiture and thereby prevent the spread of the traffic in drugs rather than to abolish the exclusionary rule formulated by the courts in furtherance of the high purposes of the Fourth Amendment. See *In re Fried*, 161 F.2d 453 (1947). Since the evidence illegally seized was contraband, the respondent is not entitled to have it returned to him. It being his property, for purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial. 342 U.S. at 53-54.

The Courts of Appeals have consistently recognized that ownership of the item seized is relevant to a determination of the right to object, regardless of the contraband nature of the item. See, *United States v. Fahnbulleh*, 748 F.2d 473, 477 (8th Cir. 1984) (ownership of cocaine to be considered); *United States v. Bachner*, 706 F.2d 1121, 1126 (11th Cir. 1983) (actual or constructive possession of quaaludes is a factor to be considered); *United States v. Brock*, 667 F.2d 1311, 1320 (9th Cir. 1982) (ownership of contraband is a factor to consider); *United States v. Haydel*, 649 F.2d 1152, 1155 (5th Cir. 1982) (ownership of gambling records to be considered).

Two of the factors in this case, a possessory interest in the place searched, and in the item seized, give Quinn standing to object to the search. In *United States v. Jeffers*, the Court held that Jeffers' interest in the hotelroom searched, coupled with his ownership of the cocaine

seized, gave him a legitimate basis to contest the search of the room which uncovered contraband. 342 U.S. at 50-51. In *Bumper v. North Carolina*, 391 U.S. 543, 544, 546-548, (1968) the Court found that Bumper's interest in both the house searched and the rifle seized permitted him to object to the search.

In *Rakas*, the Court noted that *Jeffers* and *Bumper* premised standing on the possessory interest in "both the premises searched and the property seized" 409 U.S. at 136. The Court cited *Jeffers'* holding again in *Salvucci*, 448 U.S. at 90 n.5. The rule of *Jeffers*, which was approved in *Rakas* and *Salvucci*, that a possessory interest in *both* the premises searched and the item seized confers standing to object to the search of the premises which led to the seizure of the item, is applicable here. Given Mr. Quinn's dual interests in both the place searched and the property seized, he has standing to contest the search in this case.

The Court of Appeals considered the effect of two additional factors: the private location of the item seized, and the relationship of those on the boat to Mr. Quinn.

B. Location Of The Item Seized

The marijuana in this case was concealed, indicating that reasonable precautions had been taken to preserve privacy.[28] In *United States v. Chadwick*, 433 U.S. 1, 11 (1977), the Court ruled that by placing personal effects inside a double-locked footlocker, the defendants had mani-

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[28]Not only was the marijuana not in plain view; it could only be located after the forward holds were pumped out, and the water was apparently strained.

fested an expectation that the contents would remain free from public examination no less than one who locks the doors of his home against intrusion. While a subjective expectation of privacy is not conclusive in itself, it is a relevant and important consideration. In *Katz* the Court discussed Katz's efforts to maintain privacy of his conversations by closing the phone booth. What a person knowingly exposes to the public is not a subject of Fourth Amendment protection; but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz*, 389 U.S. at 35. See also, *Rios v. United States*, 364 U.S. 253, 255 (1960); *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

C. Joint Use Of The Property

Finally, the nature of the use of the property in the joint venture is relevant to the determination of Fourth Amendment protection. In this case Michael Quinn's absence at the time of the search does not preclude determination of the merits of his suppression claim because where a joint venture is being pursued, the mere fact of the joint venturer's absence from the place searched is insufficient to establish abandonment of the property seized. *Quinn*, 751 F.2d at 981. This analysis of the relation of the parties to the property is precisely in accordance with *Rawlings*, in which the Court engaged in a lengthy examination of Rawlings' relation to Vanessa Cox to determine whether he preserved a privacy interest in her purse, 448 U.S. at 105. Given the precipitious nature of the bailment, and Cox's far from enthusiastic acceptance, the Court held that Rawlings did not have standing. In this case, by contrast, Hunt was present on the boat with Mr. Quinn's

agreement, pursuing their joint plan. He was on the boat only because of this agreement with Quinn, and was going about their mutual business at the time of the seizure and search.[29] When a defendant enters into an arrangement that indicates joint control and supervision of the place searched, he may challenge the search of that place. *Little*, 735 F.2d 1049, 1052-1054 (8th Cir. 1984) *rev'd on other grounds* 743 F.2d 1261, *cert. denied* Nos. 84-1122 and 84-1126 (February 19, 1985); *Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984); *Perez*, 700 F.2d 1233, 1236 (8th Cir. 1983); *Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982). Here the boat was proceeding to its location pursuant to the agreed plan. Of course, Quinn derives no special standing or benefit from the mere fact of Hunt's status as co-conspirator. But if the evidence shows, as it did, a mutual or joint interest in property or its use, then this is a relevant factor to determine expectation of privacy, but more importantly, to show that absence of defendant at the time of the search does not constitute abandonment or relinquishment. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized or permitted by society. *Rakas*, 439 U.S. at 143

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[29]Indeed, because of their joint venture, Mr. Quinn was constructively in possession of both the boat and marijuana at the time of their seizure. The law recognizes two kinds of possession, "actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and intention, at a given time, to exercise dominion or control over a thing, either directly or *through another person or persons*, is then in constructive possession of it." Devitt and Blackmar, Federal Jury Practice and Instructions (3rd ed.) Section 16.07 (emphasis added)

n.12.[30] Just as Jeffers' Fourth Amendment interest derived in part from his relationship and understanding with his aunt whose hotel room he used, and Bumper's standing derived in part from the understanding he had with his grandmother concerning his rights in her house, here, the agreement and understanding between Hunt and Quinn shows no relinquishment by Quinn, but a continued use pursuant to Quinn's purpose, of the Sea Otter.

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[30]In this regard, a Court of Appeals opinion recently observed:

> Obviously, the word "legitimate" in the phrase "legitimate expectation of privacy" is being used in a special sense. An agreement to use an airplane to transport illegal drugs, and an undertaking to guard the plane to prevent detection, are by no means legitimate. The cases must be analyzed on the hypothesis that no illegal activity is occurring or contemplated. The illegality comes to light only through execution of the warrant or court order whose validity is the very point at issue. Otherwise Fourth Amendment analysis would be pointless, because motions to suppress are never made in the first place unless evidence of criminality has been seized. So the "expectation" that must be taken as a predicate for analysis in this case is the expectation of any innocent person who has arranged with an owner or lessee to use an airplane. *United* v. *Little*, 735 F.2d at 1052 (8th Cir. 1984) *rev'd on other grounds* 743 F.2d 1261, *cert. denied* Nos. 84-1122 and 84-1126 (February 19, 1985).

CONCLUSION

Respondent respectfully requests that the Court affirm the judgment of the Court of Appeals and remand this case to the district court for an evidentiary hearing and a ruling on the merits of the motion to suppress.

Respectfully submitted,

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No. 84-1717

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE UNITED STATES

In this case the only question preserved below, decided by the court of appeals, and presented in our petition for certiorari is whether respondent had a reasonable and legitimate expectation of privacy in the *Sea Otter* that gave him "standing" under the Fourth Amendment to challenge the *search* of the vessel. In his brief in this Court, however, respondent subordinates that question to the issue he now seeks to assert of whether he had "standing" based on his ownership of the *Sea Otter* to challenge the *seizure* of the boat. Respondent's new-found litigating position is not properly before the Court and in any event is without merit. With regard to the question that is presented here, the Ninth Circuit plainly erred in reversing the district court's ruling that respondent lacked "standing" to contest the search of the *Sea Otter*.

1. The evidence at issue in this case is marijuana debris that was found when the hold of the *Sea Otter* was pumped out. In arguing that he had an expectation of privacy in the *Sea Otter*, and therefore was entitled to challenge that search as the basis for seeking suppression

of the evidence, respondent essentially tracks the opinion of the court of appeals. In so doing, respondent fails to come to grips with the analysis presented in our opening brief, which demonstrated that an expectation of privacy was not established by respondent's ownership of the *Sea Otter* (see U.S. Br. 13-16),[1] his role as a co-venturer in the drug smuggling operation (see U.S. Br. 17-19), his possessory interest in the marijuana that had been transported in the *Sea Otter* (see U.S. Br. 19-24), and the existence of water in the ship's hold that had to be removed in order to recover the marijuana debris (see U.S. Br. 24 n.16). We add the following brief comments in reply to respondent's specific contentions.[2]

In seeking to support his expectation of privacy, respondent argues (Br. 21, 27 n.29) that he was in constructive possession of the *Sea Otter* and its cargo of marijuana by virtue of his title to the boat, his ownership of the drugs, and his involvement as a co-venturer in the enterprise. We agree that these facts would render respondent criminally liable for constructively possessing and importing marijuana. But that does not establish the requisite privacy

[1] See also *United States* v. *Metzger*, 778 F.2d 1195, 1200 (6th Cir. 1985) ("[i]t is well-settled * * * that ownership interest is only one fact to be considered and standing alone will not give defendant a reasonable expectation of privacy").

[2] We also note that in several instances (see Resp. Br. 5 n.5, 6 nn.6, 7, 25 n.28) respondent now either disputes the government's factual submission in the district court or relies on assertions that are outside the record. (In his brief in the court of appeals (at 6, 7), on the other hand, respondent acknowledged that the relevant facts "are largely uncontested" and "essentially undisputed"; at no point in the district court or the court of appeals did respondent take issue with the government's statement of facts.) While these differences are not material to the legal issue presented in this Court, they do illustrate the problems that can arise when a defendant does not satisfy the burden placed on him of alleging and (if necessary) proving the facts required to establish his "standing." See U.S. Br. 12.

interest under the Fourth Amendment. In *United States* v. *Salvucci*, 448 U.S. 83 (1980), this Court rejected the proposition, which had underlain the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960), that the government could not "assert that the defendant possessed the goods for purposes of criminal liability, while simultaneously asserting that he did not possess them for the purposes of claiming the protections of the Fourth Amendment" (448 U.S. at 88). As the Court explained, "a prosecutor may, with legal consistency and legitimacy, assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure" (448 U.S. at 88-89). The doctrine of constructive possession well illustrates the Court's conclusion in *Salvucci* that a defendant's possessory interest is not equivalent to an expectation of privacy protected by the Fourth Amendment.[3] See also *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980).

Respondent also misconstrues our argument in several respects. First, our position is not, as respondent characterizes it (Br. 22-23), that a defendant cannot have an expectation of privacy in an area in which contraband is hidden or that his interest in the concealed contraband is irrelevant in analyzing the issue of privacy. On the contrary, our opening brief (at 22-23 & n.15, 25-26) explicitly recognized that the use a person makes of an area to keep his property, including contraband, may bear on his expectation of privacy and that a privacy interest in a place is not lost simply because contraband is stored there. See *Rawlings*, 448 U.S. at 105; *Salvucci*, 448 U.S. at 91; *Rakas* v. *Illinois*, 439 U.S. 128, 142 n.11, 144 n.12 (1978).

[3] The government's briefs in *Salvucci* (see U.S. Br. at 23-28; U.S. Reply Br. at 21-25) relied on the doctrine of constructive possession as the primary example of the difference between a possessory interest proscribed under substantive criminal law principles and a privacy interest protected under the Fourth Amendment.

Rather, our point is that under *Rawlings, Salvucci*, and *Rakas* a possessory interest in the items seized, while relevant in indicating the use to which the searched area was put, does not itself establish a privacy interest in the area. Our further point is that, even if a possessory interest in the item seized were sufficient in and of itself to entitle a defendant to contest the search of the place where the item is located, an interest in contraband is wholly illegitimate and therefore would not support a Fourth Amendment claim premised on the government's interference with the defendant's right of possession. Contrary to respondent's understanding, our argument does not deny that a reasonable expectation of privacy can exist in an area that a person uses for an illicit purpose.[4]

In addition, respondent characterizes (Br. 26-28) our argument to be that a defendant automatically abandons his privacy interest if he turns over his property to another and is not present at the time of the search. However, our opening brief specifically stated that abandonment would *not* necessarily occur in those circumstances. See U.S. Br. 17 n.7.[5] But more importantly, we also explained that the

[4] For this reason, respondent's reliance (Br. 23-25, 28) on *United States* v. *Jeffers*, 342 U.S. 48 (1951), does not support his contention. As discussed in our opening brief (at 23 n.15, 25-26), this Court has explained that "standing" in *Jeffers* rested on the defendant's expectation of privacy in light of his access to and use of the hotel room that was searched. *Jeffers* holds that a privacy interest can exist even though the defendant has no common-law property right in the searched premises and uses it, among other purposes, to store drugs; it does not suggest that bare ownership of the searched area and its use by *others* to secrete contraband would create an expectation of privacy.

[5] In this case, though, we do believe that respondent, by giving up custody and control of the *Sea Otter* to Hunt for such an extended period, would have lost any reasonable expectation of privacy he might previously have had. See U.S. Br. 16 n.6, 17 n.7.

question in this case is not whether respondent abandoned a privacy interest that he had; rather, it is whether he had an expectation of privacy in the first place. For the reasons stated in our opening brief, we submit that respondent never had an expectation of privacy in the *Sea Otter*. To reformulate this issue in terms of abandonment, as respondent seeks to do, can serve only to invite confusion and obscure sound analysis.

Respondent further complains (Br. 21-22) that we erred in relying on the fact that he relinquished custody and control over the *Sea Otter* to Hunt for the two-year period following the search in addition to the two-month period preceding it. Citing *Walter* v. *United States*, 447 U.S. 649, 658 n.11 (1980) (opinion of Stevens, J., announcing the judgment of the Court), respondent contends that events subsequent to the search are irrelevant to the issue of his expectation of privacy at the time of the search. In the abstract, however, we do not see why later events cannot illuminate a defendant's prior expectations. And in any event the result in this case would not be any different if the *Sea Otter* had been returned to respondent immediately after the search. But most significantly, our argument here, in contrast to *Walter*, is not that a defendant waives a privacy interest if he does not promptly assert his claim by seeking to retrieve property that might incriminate him. Instead, respondent contemplated from the beginning that Hunt would retain the *Sea Otter* even after the smuggled marijuana had been delivered to respondent's ranch. See U.S. Br. 2-3. Respondent's contemporaneous understanding that the boat would be out of his custody and control not only for the extended period of Hunt's South American voyage, but for an indefinite period thereafter as well, plainly indicates that respondent had no reasonable expectation of privacy.[6]

[6] By contrast, the fact that respondent was living on the *Sea Otter* in August 1983 (Resp. Br. 3, 6, 22)—more than four years after the

Respondent also objects (Br. 21) that our argument does not address the "conjunction" (Pet. App. 2a) of the considerations invoked to support his "standing." We acknowledged in our opening brief (at 25-26) that in some circumstances a combination of factors could give rise to an expectation of privacy even though each of them individually might not be sufficient. But in this case, *none* of the factors asserted by respondent contributes to his claim of privacy; whether taken singly or cumulatively, those factors – his title to the *Sea Otter*, his role as a co-venturer, his interest in the smuggled marijuana, and the presence of water in the hold – do not create the requisite privacy interest to entitle respondent to challenge the search of the vessel.

In the end, the decision of the Ninth Circuit cannot be reconciled with fundamental Fourth Amendment principles established by this Court. In effect, the court of appeals has established a new rule of "automatic standing" that would allow a defendant who is the absentee owner of a conveyance – and who, as in this case, will often be the organizer or leader of the illegal enterprise – to challenge any search of the conveyance that occurs during a joint criminal venture. In this way, as Judge Sneed noted in his dissent below (see Pet. App. 4a), the court has invested criminal defendants with a privacy interest that would not exist for "innocent and law abiding" people in similar but lawful circumstances. There is no warrant in the Constitution for recognizing greater expectations of privacy for criminal defendants than for the general public.

2. Relegating the foregoing issue to a secondary position, respondent now principally defends the judgment below on the ground that he was entitled as the owner of the *Sea Otter* to challenge the *seizure* of the vessel and consequently could move to suppress the evidence obtained during the ensuing *search* as the fruit of that seizure. Although respondent does not seek to contest the stop and boarding of the *Sea Otter* (see Resp. Br. 10; see also U.S. Br. 9-10), he contends that federal officials acted improperly in seizing the boat and transporting it to the Coast Guard station where the hold was pumped out. However, respondent's claim of "standing" to challenge the seizure is neither appropriately raised here nor analytically correct.

search in question and almost two years after the boat was turned over to him by Hunt – is clearly irrelevant to the issue of his privacy interest at the time of the search.

a. Respondent chides us for "confus[ing] the concept of 'seizure' with that of 'search' " (Resp. Br. 10; but see U.S. Br. 20), for "seek[ing] to recharacterize the legal issue in this case * * * [and] completely ignor[ing] the primacy of the seizure" (Resp. Br. 10 n.9), and for "blithely ignor[ing] the seizure to focus exclusively on the ultimate search and [respondent's] privacy interests" (*id.* at 12). In actuality, however, it is respondent who offers a revisionist history of this litigation and attempts to recast the controversy in order to raise a new legal issue for the first time in this Court.

In the district court, respondent moved for the "suppression of evidence seized as a result of the search of the [*Sea Otter*]" (J.A. 25) "because there was not probable cause to justify this warrantless search of the vessel" (J.A. 26).[7] The government's memorandum in opposition argued that respondent had "no standing to contest the search of the SEA OTTER" (J.A. 31) because "the search of the SEA OTTER and the seizure of the marijuana * * * [did not invade his] legitimate expectation of privacy" (J.A. 32); in particular, the government noted that respondent could "assert only ownership as a basis for a legitimate expectation of privacy in the SEA OTTER"

[7] Respondent's motion also referred to the initial stop of the *Sea Otter*, an issue that, as noted above, he no longer asserts.

(*ibid.*) and that ownership was not sufficient to establish a privacy interest in the circumstances of this case (J.A. 32-33). The district court ruled that respondent "has no standing to present the motion to suppress and that motion will be denied" (Pet. App. 9a).

Following the district court's denial of the suppression motion, respondent entered a conditional plea of guilty, pursuant to an agreement with the government, "in order to preserve his right to appeal the District Court's decision that he had no standing to contest the search of the 'SEA OTTER' " (J.A. 21). The agreement expressly stated that respondent's "appeal will be limited to that one issue" (*ibid.*).

The caption in his opening brief in the court of appeals (at 6) describes respondent's argument to be that he "had standing to contest the legality of the search of the Sea Otter because he was the owner of the Sea Otter, and the owner of the items seized"; respondent asserted that these ownership interests sufficed to confer "standing" and that the search of the boat "infringed upon an area in which [respondent] had an expectation of privacy" (*id.* at 9).[8] In turn, the government's brief (at 8) argued that "an ownership interest does not create an expectation of privacy where the defendant relinquished possession of the item searched" and that respondent did not have "a legitimate expectation of privacy in the invaded place" (*id.* at 9); accordingly, it concluded that because respondent had "relinquished any expectation of privacy, he should not be allowed to contest the search" (*id.* at 12). In his reply brief (at 2), respondent, seeking to answer the government's

[8] In several places in his brief, respondent referred without differentiation to the "seizure and search" of the *Sea Otter*. At no point, however, did respondent focus on the seizure separately from the search or discuss the seizure in terms of the detention of the vessel to transport it to the Coast Guard station.

argument that he "lacks standing to contest the legality of the search," contended that he "has a Fourth Amendment right to a reasonable expectation of privacy in the contents of the boat"; based on that contention, respondent asked the court of appeals to "remand the case to the district court for resolution [on the merits] of the issue of the legality of the search of the Sea Otter" (*ibid.*).[9]

After submission of the briefs, the court of appeals entered an order directing counsel to respond to the following questions at oral argument:

> 1. Does [respondent] have standing to contest the search of the Sea Otter based upon an arrangement between [respondent] and Hunt that indicates joint control and supervision of the Sea Otter? • • •
>
> 2. Does [respondent] have standing to contest the search of the Sea Otter based upon a formalized agreement with Hunt for the transportation of marijuana? • • •

Order of July 20, 1984. Following oral argument, the court of appeals rendered its decision reversing the district court's ruling that respondent "lacks standing to contest the search of his fishing vessel" and holding that respondent "had a legitimate expectation of privacy in the place

[9] In his reply brief, respondent again referred without distinction to the "seizure and search" of the *Sea Otter*. In addition, and for the first time in this proceeding, respondent adverted (at 3) to the question "whether the observations of the Customs Patrol officers amounted to probable cause for the forcible seizure and pumping of the holds of the vessel." This passing reference in the reply brief to the "forcible seizure" as well as the search of the *Sea Otter* is simply too little and too late to preserve the issue petitioner now seeks to advance. Indeed, respondent himself expressly acknowledged (*ibid.*) that in the plea agreement it had been "specifically agreed that the appeal in this case would be solely on the issue of whether [respondent] had standing to contest the search of the Sea Otter."

searched (his boat), giving him a basis to charge that the search invaded his Fourth Amendment rights" (Pet. App. 2a).

Finally, in seeking review in this Court of the court of appeals' decision, the single question presented in our petition for certiorari was whether respondent "has a Fourth Amendment expectation of privacy that entitles him to challenge the search of" the *Sea Otter* in the circumstances of this case.

Against this background, it is clear that the sole issue presented throughout this litigation has been whether respondent had an expectation of privacy in the *Sea Otter* that would give him "standing" to challenge the *search* of the boat. That was the only question raised in the district court (see Fed. R. Crim. P. 12(b)(3) and (f)), preserved in the conditional plea agreement (see Fed. R. Crim. P. 11(a)(2)), submitted to and decided by the court of appeals, and encompassed in the petition for certiorari in this Court. Having failed to raise and preserve the point below, respondent cannot now interject the issue of his "standing" to challenge the seizure of the *Sea Otter* as a purported alternative ground for affirming the court of appeals' judgment that he had "standing" to challenge the search.

b. At all events, in the circumstances of this case, respondent's ownership of the *Sea Otter* did not give him "standing" to contest the validity of transporting the vessel to a Coast Guard station in order to pump out its hold. As discussed in our opening brief (at 20), a seizure entails a governmental interference with a person's possessory interest in the object that was seized; in contrast, a search involves an intrusion upon a person's reasonable and legitimate expectation of privacy in the area or item that was searched. See also *United States* v. *Chadwick*, 433 U.S. 1, 33 n.8 (1977) (seizure of a footlocker was "a substantial infringement of [defendants'] use and possession" but "did not diminish [their] legitimate expectation that the footlocker's contents would remain private"); *Texas* v. *Brown*, 460 U.S. 730, 747-748 (1983) (Stevens, J., concurring in the judgment) (a seizure implicates "the interest in retaining possession of property" while a search involves "the interest in maintaining personal privacy"); *United States* v. *Place*, 462 U.S. 696, 716 (1983) (Brennan, J., concurring in the result).

We assume here that property unlawfully seized, as well as the fruits of the unlawful seizure, would be subject to suppression under the exclusionary rule. See *Place*, 462 U.S. at 700-701, 707-710; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 473, 478 (1971); *Davis* v. *Mississippi*, 394 U.S. 721, 724 (1969); but cf. *Salvucci*, 448 U.S. at 91 n.6; *United States* v. *Lisk*, 522 F.2d 228, 230 & n.4 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976), subsequent opinion, 559 F.2d 1108 (7th Cir. 1977). It may also be assumed that a person whose property is temporarily ou of his possession can retain a sufficient interest in that item to contest its seizure. See U.S. Br. 20 n.11; see also *United States* v. *Jacobsen*, 466 U.S. 109, 120-121 & n.18 (1984); *Place*, 462 U.S. at 705-706 & n.6; *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970).[10]

However, "[t]he intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent." *Place*, 462 U.S. at 705. In this case, no interest of respondent's was infringed by the government's brief detention of the *Sea Otter* to take it to port.

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[10] Accordingly, while not endorsing each of the historical authorities or decisions cited by respondent (see Resp. Br. 12-20), we do not disagree with the principle that one has "standing" to challenge a seizure if it actually infringed his possessory interest. For example, as respondent is at pains to demonstrate, the owner of a ship that has been wrongfully seized and forfeited can bring a civil action for compensation.

As previously discussed, at the time the *Sea Otter* was apprehended respondent had relinquished custody and control of the boat to Hunt both for the preceding two-month period and for what promised to be and in fact was an extended duration thereafter. During that time, respondent's ownership of the *Sea Otter* gave him no cognizable interest in the freedom of movement of the vessel; the brief period of its detention did not interfere with respondent's residual right to the return of the *Sea Otter* at some indefinite point in the future or even with his commitment of the boat to be used in the joint criminal venture. If the *Sea Otter* had been delayed by bad weather (as in fact occurred), by mechanical problems, or by a frolic and detour on Hunt's part, respondent's interests would not have been harmed in any way. Cf. *Van Leeuwen*, 397 U.S. at 253. The same conclusion is equally applicable to the brief delay occasioned by taking the *Sea Otter* to the Coast Guard station, and therefore respondent had no interest that was implicated by that seizure.

Significantly, respondent appears to concede (Br. 10) that he does not have "standing" to challenge the seizures of the *Sea Otter* involved in the stop and boarding of the boat by California Fish and Game officials or by federal Coast Guard and Customs authorities. That concession is plainly correct, since the brief, temporary interference with the movement of the ship and its crew, had it not led to discovery of criminal activity, could not have affected respondent. See U.S. Br. 9-10. Precisely the same analysis applies to the subsequent detention of the boat when it was taken to port; that detention, while presumably lasting for a somewhat longer period, no more interfered with any interest of respondent's than did the initial stop and boarding.

Notwithstanding respondent's contention (Br. 17-20), our argument does not rest on the notion that he had abandoned his interest in the *Sea Otter*. On the contrary,

we do not dispute that respondent remained the owner of the vessel and retained all incidents of legal title. But his rights as the owner were simply not infringed by the government's brief detention of the *Sea Otter*. That seizure constituted a restraint on the immediate use of the boat; because respondent had turned over the *Sea Otter* to Hunt, he had "[n]o interest protected by the Fourth Amendment [that] was invaded by [the seizure]." *Van Leeuwen*, 397 U.S. at 253. As in *Van Leeuwen*, respondent is " 'unable to show that the [seizure] intruded upon * * * a possessory interest in the [seized object itself].' " *Place*, 462 U.S. at 705-706 n.6, quoting 3 W. LaFave, *Search and Seizure* § 9.6, at 71 (Supp. 1982). See also *Place*, 462 U.S. at 717 n.5 (Brennan, J., concurring in the result).[11]

For the foregoing reasons and those stated in our opening brief, it is therefore respectfully submitted that the judgment of the court of appeals should be reversed.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

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[11] We also note that the facts recited in the government's submission in the district court (see J.A. 29-31, 39-43), including the observation of marijuana debris in plain view by the California Fish and Game officials, clearly established probable cause to seize the *Sea Otter* and transport it to the Coast Guard station (assuming arguendo that probable cause is the standard for such a seizure).